No. _____ 98 1887 MAY 24 1999

In The
Supreme Court of the United States OFFICE OF THE CLERK

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; BARBARA HOLT, President of North Carolina Right to Life Incorporated,
Petitioners,

v.

GARY O. BARTLETT, in his official capacity as Executive Secretary-Director of the State Board of Elections of the State of North Carolina; STEVE A. BALOG, in his official capacity as District Attorney for North Carolina Prosecutorial District 15A, and as a representative of the class of District Attorneys in the State of North Carolina; MIKE EASLEY, in his official capacity as Attorney General for the state of North Carolina; JUNE K. YOUNGBLOOD, in her official capacity as a Member of the State Board of Elections; DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in holding that a North Carolina statute, which prohibits lobbyists and the political action committees that employ them from contributing during a legislative session to candidates for state elective office, was constitutional under the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

Petitioner North Carolina Right to Life, Inc. (NCRL) is a nonprofit corporation organized under North Carolina law. NCRL has neither parent companies nor subsidiaries. Petitioner North Carolina Right to Life Political Action Committee was established by NCRL and is an internal state political action committee. Petitioner Barbara Holt is an individual, is the employee President of NCRL, and is a registered lobbyist in North Carolina.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reproduced in the Appendix filed herewith ("App.") at App. 1, and is reported at 163 F.3d 705 (4th Cir. 1999). The opinion of the district court is reported at 3 F. Supp. 2d 675 (E.D.N.C. 1998), and is reproduced at App. 25.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States and the relevant provisions of Chapter 163, Subchapter VIII, "Regulations of Election Campaigns," of the North Carolina Revised Statutes are set forth in the Appendix beginning at App. 38.

STATEMENT OF THE CASE

This case concerns the constitutionality of N.C. Gen. Stat. § 163-278.13B (1994),[1] a provision of North Carolina's

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[1] While this action was pending in the district court, N.C. Gen. Stat. § 163-278.13A was repealed and replaced with N.C. Gen. Stat. §

election and campaign finance law. The court of appeals held that this statute, which prohibited lobbyists and the political action committees that employ them from contributing to the campaigns of candidates for the Council of State and the General Assembly, was constitutional. The court rejected the Petitioners' (Appellees' below) contention that this provision impermissibly burdened their First Amendment rights of free speech and association and denied them equal protection of the laws.

The district court granted Petitioners' summary judgment on April 30, 1998, App. 26, declaring the challenged statute facially unconstitutional and enjoining its enforcement against Petitioners and all others similarly situated. App. 37. The court found that the "temporal limitation" was a "complete ban on fundraising while the legislature is in session," and that it had "'a severe impact on political dialogue' by 'prevent[ing] candidates from amassing the resources necessary for effective advocacy.'" App. 36 (*quoting Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). Therefore, the court applied the strict scrutiny standard elucidated by this Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). App. 36.

Assuming without deciding that North Carolina's asserted aims were legitimate and compelling, the district court held the statute was not narrowly tailored to advance the purported interests in the least intrusive way because the statute applies to both incumbents and non-incumbents. App. 36. The court also found that "the statute fails to account for the fact that political corruption may occur at

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163-278.13B, which extended the ban on contributions to include non-incumbent candidates for the legislature and Council of State. The prior version only applied to incumbent candidates. Petitioners amended their complaint to challenge N.C. Gen. Stat. § 163-278.13B.

anytime, whether or not the legislature is in session." App. 36. Finally, the court held the ban unconstitutional because "it does not discriminate between large contributions with the potential to corrupt and small contributions with no such corruptive potential." App. 36.

On February 18, 1999, the Fourth Circuit Court of Appeals reversed[2] holding that N.C. Gen. Stat. § 163-278.13B's contribution and solicitation prohibitions were constitutional. App. 23. In rejecting the Petitioners' claim that the State's compelling interest, in the prevention of corruption or the appearance of corruption, resulted only from large individual contributions, the court of appeals stated that the Petitioners defined North Carolina's interest "too narrowly," because "[c]orruption, either petty or massive, is a compelling state interest because it distorts both the concept of popular sovereignty and the theory of representative government." App. 18.

The court of appeals claimed "a genuine risk of both actual corruption and the appearance of corruption" existed, App. 18, because "lobbyists are paid to effectuate particular political outcomes" and "[t]he pressure on them to perform mounts as legislation winds its way through the system." App. 18-19. The court of appeals, however, cited no examples of actual corruption in North Carolina but instead relied upon recent cases of influence peddling in other states and stated that "[s]tate governments need not await the onset of scandal before taking action." App. 19.

The court of appeals also held that these restrictions were narrowly tailored because they are "limited to lobbyists and the political committees that employ them," and because "the restrictions are temporally limited" to only the

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2 The other provisions of the statute, which were stuck down by the court of appeals, are not at issue here.

legislative session which typically covers just a few months in an election year. App. 20.

The court of appeals also rejected the Petitioners' claim that the statute violates the equal protection clause of the Fourteenth Amendment because it treats lobbyists and political committees differently than other citizens with respect to their right to contribute to candidates. The court of appeals found that North Carolina advanced strong reasons for doing so. App. 22.

Finally, the court of appeals disposed of the Petitioners' challenge that the statute impermissibly forces them to forego their constitutional right to petition the government for a redress of grievances if they also wish to exercise their First Amendment right to associate by contributing to candidates. Claiming that the Petitioners' position is similar to that of federal employees, the court of appeals found North Carolina's interests compelling and the burden on Petitioners' association rights minimal. App. 22-23.

REASONS FOR GRANTING THE PETITION

Under North Carolina's statute, lobbyists and their employers, unlike the rest of North Carolina's citizenry, are prohibited from exercising their First Amendment right to contribute to candidates when the state legislature is in session. The court of appeals did so by deeming lobbyists, and their employers, to be a prohibited source of campaign contributions, in an unprecedented and unwarranted expansion of the prohibition on political activities by certain groups.

Compounding its analytical errors, the court of appeals upheld the contribution prohibition even though there was no evidence in North Carolina that lobbyists' participation in the political process is inherently corrupting

of the political process or resulted in quid pro quo corruption of any candidate or public official.

For these reasons, and to resolve the conflicts that the Fourth Circuit's opinion has created with other circuits and the Supreme Court of California, this Petition should be granted.

I. The Fourth Circuit Erred In Holding That Lobbyists Are A Prohibited Source For Campaign Contributions During The Legislative Session And Therefore This Decision Warrants Review.

This Court has defined two distinct types of corruption which may justify restrictions on campaign finance. First, this Court has identified certain **sources** of campaign contributions as posing such an inherent risk of corrupting the political process that they could be totally barred from political participation. Second, this Court has identified **large individual contributions** as posing a sufficient risk of quid pro quo corruption that such contributions could be barred. The Fourth Circuit erroneously used elements of each analysis in finding that lobbyists and their employers were prohibited sources of campaign contributions during a legislative session.

Certain persons or entities have been found to be a prohibited source of campaign contributions and expenditures. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)(upholding Hatch Act provision which prohibits federal employees from certain political activities); *Austin*, 494 U.S. 652 (upholding a prohibition on business corporations from using corporate treasury funds for independent expenditures). In other cases, this Court has rejected attempts to bar certain persons or entities from political activities. *First National Bank v. Bellotti*, 435 U.S. 765 (1978)(striking down a prohibition on corporate expenditures regarding state referendums); *Federal*

Election Commission National Conservative Political Action Comm., 470 U.S. 480 (1995)(striking down a federal law limiting independent expenditures by political action committees); *MCFL*, 479 U.S. 238 (holding that the prohibition on independent expenditures by business corporations could not constitutionally be applied to not-for-profit ideological membership corporations); *Meyer v. Grant*, 486 U.S. 414 (1988)(striking down a law prohibiting paid referendum petition signature gatherers).

In cases utilizing the prohibited source analysis, the focus is on whether the "potential for distortion," *Austin*, 494 U.S. at 661, of the political process is sufficient to justify the intrusion on First Amendment rights that are involved.

Campaign contribution limit analysis, however, assumes that a particular group's participation is not inherently corrupting and instead is used to determine what *level* of participation would corrupt the political process. In contrast, prohibited source analysis focuses on whether a particular *group's* participation in the *political process* is inherently corrupting. The definition of corruption in the latter context is different from that used in a contribution limit analysis where the focus is on quid pro quo corruption, or the appearance thereof, that may result when large, individual contributions are given to candidates. *Buckley*, 424 U.S. at 15; *see generally* Bopp, *The Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99). The analysis used in each are separate and distinct.[3]

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3 The Supreme Court of Florida recognized the difference between a prohibition on contributions and a cap on the level of participation through contributions. *See State of Florida v. Dodd*, 561 So.2d 263, 266 (Fl. 1990)("The Court in *Buckley* confronted, not a complete prohibition on soliciting or accepting contributions, but a ceiling on the amounts that candidates could spend and that individuals could contribute. . . . The statute at issue here prohibits all contributions

The Fourth Circuit, however, in analyzing the prohibition on lobbyist contributions, conflated the prohibited source analysis with that used for contribution limits. The Fourth Circuit rejected the notion that "the prevention of corruption or appearance of corruption . . . only . . . results from large contributions." App. 18. The Fourth Circuit then defined corruption, both massive and petty, as the distortion of "both the concept of popular sovereignty and the theory of representative government." App. 18.

However, the Fourth Circuit, while noting instances of influence peddling on the part of legislators in other states, App. 19, made no finding, supported by evidence in the record, that North Carolina lobbyists and their employers had an inherent and unique ability to corrupt legislators. Other citizens are not barred from making contributions to legislators during the legislative session and there was no finding that campaign contributions from lobbyists, as opposed to citizens, are particularly likely to result in a quid pro quo.

Furthermore, since North Carolina allows contributions of up to $4,000 per election to candidates, App. 16, there was no reason given why a contribution of a lesser amount, or of any amount, from a lobbyist was more likely to result in a quid pro quo than such a contribution from a citizen.

Finally, since lobbyists and their employers are permitted to make contributions when the legislature is not in session, there was no reason given why campaign contributions given before or after a legislative session, of a legal amount from a lobbyist, was less likely to result in a quid pro quo.

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and solicitations. . . . As a result, the present case is vastly different from *Buckley*.").

Thus, lobbyists cannot be said to inherently corrupt the political process by their participation. Instead, the Fourth Circuit determined that the *level* of participation (making contributions) of lobbyists during the legislative session could constitutionally be zero, App. 23, despite an implicit finding by the North Carolina legislature that amounts under $4,000, from all sources, are non-corrupting. App. 16.

Thus, the Fourth Circuit erred in determining that lobbyists may be regulated as a prohibited source and thus denied the right to make contributions to candidates. Therefore, this decision warrants review by this Court.

II. The Fourth Circuit's Decision Holding Lobbyists A Prohibited Source Of Contributions Conflicts With Decision Of The Highest State Court In California Holding A Similar Statute Unconstitutional.

The Fourth Circuit's decision that lobbyists can be prohibited from making campaign contributions is in direct conflict with the Supreme Court of California's decision that applied *Buckley* and found California's prohibition of all contributions by lobbyists was a substantial restriction on the lobbyists' freedom of association and was not a closely drawn restriction.[4]

In *Fair Political Practices Commission v. Superior Court of Los Angeles County*, 599 P.2d 46 (Cal. 1979), the

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4 Several state supreme courts have, however, found that lobbyists may constitutionally be prohibited sources. The Alaska Supreme Court upheld as constitutional a ban on lobbyists' out-of-district contributions. *State of Alaska v. Alaska Civil Liberties Union*, 1999 WL 219443, at *19 (April 16, 1999). The Supreme Court of Vermont has also held constitutional a ban on lobbyists' contributions during the legislative session. *Kimbell v. Hooper*, 665 A.2d 44, 51 (Vt. 1995).

California Supreme Court found the prohibition on lobbyist contributions was overbroad because "the prohibition applies to contributions to any and all candidates even though the lobbyist may never have occasion to lobby the candidate." *Id.* at 52. The court also held that, because the statute did not discriminate between small and large contributions but prohibited all of them, it was not narrowly directed to the aspects of political association where potential corruption might be identified. *Id.* Furthermore, because lobbyists operate *outside* government structures, they do not present the same risk of mixing governmental and political processes that civil servants, regulated under the Hatch Act, present. *Id.*

This conflict should be resolved by this Court.

III. The Court Of Appeals Erred In Holding That N.C. Gen. Stat. § 163-278.13B Was Narrowly Tailored.

In addition, the court below erred when it held that the prohibition on lobbyist contributions was narrowly tailored.

(A). The Fourth Circuit erred by lumping non-corrupting small contributions with potentially corrupting large contributions.

As discussed above, the North Carolina statute prohibits all contributions, both large and small, from lobbyists and their employers. Rejecting the argument that the prohibition covers all contributions and not just those large enough to support a potential quid pro quo, the Fourth Circuit found this statute narrowly tailored stating that it "'ha[d] no scalpel to probe' such fine distinctions." App. 20 (*quoting Buckley*, 424 U.S. at 30 (internal quotation marks

omitted)). Furthermore, the Fourth Circuit found that even were it

> able to distinguish those dollar amounts that are sufficient to support actual purchases of political favors from those that are not, the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution.

App. 20. Quoting this Court's decision in *National Right to Work Committee*, the Fourth Circuit stated that it was "not in the position to 'second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.'" App. 20 (*quoting Federal Election Commission v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982)).

However, this Court has cautioned that "broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963)(internal citations omitted). As a result, the *Primus* Court rejected an attempt to regulate in a prophylactic fashion:

> At bottom, the case [] [] rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply

> 'propose[s] a commercial transaction,' [citations omitted]. In the context of political expression and association, however, a State must regulate with significantly greater precision.

In re Primus, 436 U.S. 412, 437-38 (1978). Thus, "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *Id.* at 434. Statutes touching this field should be "narrowly drawn to prevent the supposed evil." *United States v. Harriss*, 347 U.S. 612, 632 (1954) (Douglas, J., dissenting)(*quoting Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

All contributions, including small non-corrupting contributions, are prohibited by the North Carolina statute. The prohibition on lobbyist contributions is based upon the timing and the source of the contribution, not its size as required by *Buckley*.[5] Therefore, the statute is not narrowly tailored to advance the alleged interest of limiting the actuality and appearance of corruption resulting from large individual financial contributions.

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5 "[B]lanket prohibitions on all groups or individuals from making solicitations for and contributions to campaigns are disfavored." *Zeller v. The Florida Bar*, 909 F. Supp. 1518, 1526 (N.D.Fla. 1995); *see also Bellotti*, 435 U.S. at 790-93 (striking down Massachusetts criminal statute prohibiting corporations from making any contributions on any ballot questions other than those affecting property, business, or assets of the corporations). A district court has interpreted *Buckley* as holding that an individual's contributions may not be totally prohibited. *Federal Election Commission v. Weinsten*, 462 F. Supp. 243, 249 (D.C.N.Y. 1978). Another district court found a prohibition on lobbyist contributions to be "an imposition of an aggregate limit on total contributions incumbents and candidates receive during the banned time-period, in essence, a zero contribution limit." *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413, 1424 (E.D.Mo. 1996).

(B). The Fourth Circuit erred by upholding a ban on contributions to challengers as well as incumbent state officeholders.

The ban on lobbyist contributions is also overbroad because it applies to both incumbents and challengers alike. This case is distinguishable from *Buckley* where the interest was in preventing quid pro quo in the future by incumbents and challengers because both could deliver. *Buckley*, 424 U.S. at 33.

The Fourth Circuit believed that "contributions *during the legislative session* can [] be corrosive." App. 19 (emphasis added). As a result, the Fourth Circuit found the prohibition narrowly tailored precisely because it "last[ed] only during the legislative session," and "cover[ed] only that period during which the risk of an actual quid pro quo or the appearance of one runs the highest." App. 20. Yet there is nothing that challengers may do right then and there during the legislative session that could give rise to corruption or the appearance thereof.

> If [the prohibition's] purpose is to curtail corruption by eliminating financial quid pro quo contributions, the Court is hard-pressed to understand how this goal can be accomplished by applying the prohibition to non-incumbent candidates or even some public officials who are not subject to such a corrupting arrangement.

Shrink PAC, 922 F. Supp. at 1422.

(C). The Fourth Circuit failed to consider that there were more narrowly tailored remedies available under North Carolina law.

The Fourth Circuit also erred in finding the prohibition narrowly tailored because it did not consider the interplay of other statutes regulating lobbyists and those capping contributions. The North Carolina legislature has already determined that any amount under $4,000 is non-corrupting by setting this limit as its contribution limit. App. 16. Therefore, the blanket prohibition is sorely at odds with the goal of preventing the quid pro quo corruption from *large* political contributions. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-297 (1981). Furthermore, while lobbyists face the same financial contribution ceilings as do other citizens, they also are required to report their lobbying activities. Thus, the lobby law protects against lobbyists operating in secret through disclosure requirements that ensure that the identity and activities of lobbyists are a matter of public record. *See Barker v. State of Wisconsin Ethics Board*, 841 F. Supp. 255, 263 (W.D.Wis. 1993); *MCFL*, 479 U.S. at 262 (After rejecting the notion that not-for-profit ideological membership corporations could be prohibited sources of independent expenditures, this Court noted that "reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions."). Disclosure is a more narrowly tailored means of addressing the concerns here.

As a result, North Carolina cannot satisfy its burden, *Bellotti*, 435 U.S. at 786, of demonstrating that it has "employed means closely drawn to avoid unnecessary abridgment of [First Amendment] freedoms." *Buckley*, 424 U.S. at 25.

IV. The Fourth Circuit's Failure To Place The Burden On North Carolina To Prove A Real Problem With Corruption Or An Objectively Reasonable Perception Thereof Conflicts With This Court's Precedents And The Second, Eighth, Ninth And Tenth Circuits' Requirement Of Demonstrable Evidence Of Corruption.

(A). The failure of the Fourth Circuit to place the burden of proof on North Carolina conflicts with decisions of this Court.

To ensure that the government does not suppress First Amendment rights except where there is a compelling need to do so, this Court requires that the government must prove the existence of the evil it fears, the source from which it emanates, and that the means chosen are needed to eliminate the evil.

Thus, "[t]o justify suppression of free speech," this Court has held that "there must be reasonable ground to fear that serious evil will result if free speech is practiced." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995)(*quoting Whitney v. California*, 274 U.S. 357, 376 (1927)(concurring opinion)); *Bellotti*, 435 U.S. at 789-90 (The State failed to show "by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes."); *see also Berkeley*, 454 U.S. at 301-02 (Marshall, J., concurring)("If I found that the record . . . disclosed sufficient evidence to justify the conclusion that large contributions to ballot measure committees undermined the 'confidence of the citizenry in government,' I would join Justice WHITE in dissent on the ground that the State had demonstrated a sufficient governmental interest.")(citation omitted)); *Primus*, 436 U.S. at 436 ("But the Court found that potential insufficient in the absence of proof of a 'serious danger' of conflict of

interest."(*quoting Button*, 371 U.S. at 443). Not only must North Carolina bear this burden, it carries a heightened burden here because the statute "singles out expressive activity for special regulation." *National Treasury Employees Union*, 513 U.S. at 475.

> Especially where, as here, a prohibition is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling, and the burden is on the Government to show the existence of such an interest.'

Bellotti, 435 U.S. at 787 (citation omitted); *see also Burson v. Freeman*, 504 U.S. 191, 228 (1992)(Stevens, J., dissenting)("For that reason, Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary. . . .").

Although a showing of potential danger may suffice in the commercial speech context, this Court has repeatedly held that rights of political expression and association may not be abridged without substantial support in the record or findings of the state court. *See Primus*, 436 U.S. at 434 & n.27, and the cases cited therein. The Court reiterated this requirement in *National Treasury Employees Union*:

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

513 U.S. at 475 (*quoting Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664-66 (1994)(plurality opinion of Kennedy, J.)); *see also National Treasury Employees Union*, 513 U.S. at 483, 485 (O'Connor, J., concurring in part and dissenting in part)(The Court's "cases do not support the notion that the bare assertion of a laudable purpose justifies wide-ranging intrusions on First Amendment liberties" "without any showing that Congress considered empirical or anecdotal data pertaining to abuses by lower echelon Executive branch employees.").

In this case, North Carolina's statute significantly infringes upon- and in fact prohibits- the exercise of the Petitioners' First Amendment rights to associate by contributing to candidates. Under the decisions of this Court, then, North Carolina was required to demonstrate, not simply speculate, that lobbyists and their employers are so potentially corrupting that they should be prohibited from contributing during the legislative session. *See Barker*, 841 F. Supp. at 260 ("Without a showing of actual improprieties, allegations of improper motives are not a sufficient justification for a statutory prohibition of a First Amendment right. Defendants have shown no basis for finding that volunteering by lobbyists threatens the integrity of the political process any more than volunteering by other citizens. . . ."). The Fourth Circuit, however, found only a "genuine risk of both actual corruption and the appearance of corruption," App. 18, by accepting as sufficient the risk of "the temptation [of lobbyists] to exchange 'dollars for political favors.'" App. 19 (citation omitted).

The only "evidence" of influence peddling cited by the Fourth Circuit to justify this infringement of First Amendment rights comes from other states. App. 19. However, these examples are not sufficient. *See ShrinkPAC*, 922 F. Supp. at 1422 ("[I]t is not for this Court to adjudge the constitutionality of Missouri's campaign finance laws on the basis of the failings of Louisiana's legislature."). The

Fourth Circuit cites to no evidence of corruption or an appearance of corruption as a result of lobbyist contributions to candidates in North Carolina. But despite this poverty of the record, the Fourth Circuit, without elaboration, found "damaging effects of corruption." App. 23. Because the Fourth Circuit held that deference, not evidence, was sufficient to treat lobbyists as a prohibited source for campaign contributions, App. 20, it failed to follow precedent and North Carolina did not carry this burden here by demonstrating the existence of actual or the appearance of corruption.

(B). The Fourth Circuit's failure to require North Carolina to bear the burden of proof herein conflicts with decisions of the Second, Eighth, Ninth, and Tenth Circuits.

The Fourth Circuit's failure to require North Carolina to bear the burden of proof herein is also in conflict with decisions of the Second, Eighth, Ninth and Tenth Circuit Courts of Appeal. *National Advertising Co. v. Town of Babylon,* 900 F.2d 551, 555 (2d Cir. 1990)("It is a well-established rule that where legislation restricts speech, even commercial speech, the party seeking to uphold the restriction carries the burden of justifying it."); *A.C.O.R.N. v. City of Frontenac*, 714 F.2d 813, 187 (8th Cir. 1983)("[A]lthough a duly enacted statute normally carries with it a presumption of constitutionality, when a regulation allegedly infringes on the exercise of First Amendment rights, the statute's proponent bears the burden of establishing the statute's constitutionality." (citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)); *Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995)(Missouri "ha[d] failed to carry its burden of demonstrating that [its contribution limits] will [prevent *quid pro quo* corruption] in a direct and material way or is closely

drawn to avoid unnecessary abridgement of associational freedoms." (internal citation omitted));[6] *Vannatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998)("Appellants are unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in *Buckley*." (citing *Harwin v. Goleta Water District*, 953 F.2d 488, 490 (9th Cir. 1991))); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987)("[w]here . . . a law infringes on the exercise of First Amendment rights, *its proponent bears the burden* of establishing its constitutionality."(emphasis added)). This Court should grant review to resolve this conflict.

V. The Court Of Appeals Decision Forces Lobbyists To Surrender The Exercise Of One Constitutional Right To Exercise Another.

In *Simmons v. U.S.*, this Court held that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. 377, 394 (1968). This is especially true when the "'benefit' to be gained [by giving up a constitutional right] is that afforded by another provision of the Bill of Rights." *Id.* Thus, this Court held that the defendant could not be made to choose between the two valued rights.

There are two constitutional rights at stake here. "The First Amendment protects political association as well as political expression." *Buckley*, 424 U.S. at 15. As a result, campaign contributions are protected by the First Amendment. *Id.* at 23. In addition, lobbying implicates First Amendment guarantees of petition, expression, and

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6 An Eighth Circuit case applying this burden of proof to campaign contribution limits is currently before this Court. *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

assembly. *Harriss*, 347 U.S. at 625. Although this Court has never defined the scope of this right, "lobbying is protected by the First Amendment." *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961).

In rejecting Petitioners' claim that they must forgo one right to exercise another, the Fourth Circuit likened Petitioner Holt's position to that of federal employees under the Hatch Act. App. 22. However, the rationale behind the Hatch Act is inapplicable to the case at bar. While it is true that this Court upheld the constitutionality of the Hatch Act even though one must forego certain rights to participate in the political process if one wishes to take federal employment, *National Association of Letter Carriers*, 413 U.S. at 567, this Court did so because "the Hatch Act aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights." *National Treasury Employees Union*, 513 U.S. at 471 (emphasis in original). Petitioner Holt's position is not "in many respects similar to that of federal employees." App. 22. Furthermore, "[t]he governmental interests held to warrant substantial restrictions on political rights in *CSC v. Letter Carriers*, [citation omitted], have no greater application to lobbyists than to other private campaign contributors." *Fair Political Practices Commission*, 599 P.2d at 53.

Thus, the Fourth Circuit's decision is in err because it forces the lobbyists, and their employers, to forego their constitutional right to petition the government for a redress of grievances if, during a legislative session, they wish to exercise their First Amendment right to associate by contributing to candidates and incumbents.

VI. The Court Of Appeals Erred In Finding That The Petitioners Were Not Denied Equal Protection Of The Laws.[7]

The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits persons from being denied equal treatment under the laws. U.S. Const. amend. XIV, § 1. In this regard, "[t]he Constitution requires that [states] treat similarly situated persons similarly." *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). If states treat similarly situated persons differently in terms of the exercise of First Amendment rights, heightened scrutiny must be employed to determine the constitutionality of the differential treatment.[8] *New York Association v. City of New York*, 487 U.S. 1, 15-16 (1988). The Fourth Circuit, however, erred in finding that North Carolina "advanced strong reasons for" treating lobbyists and political committees differently than it does the general population. App. 22 (*citing NCPAC*, 470 U.S. at 496-97).

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7 Discrimination in the First Amendment context has sometimes been characterized as a violation of the First Amendment itself, *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 & n.3 (1987) (Stewart, J., concurring); *Bellotti*, 435 U.S. at 785-86; *Buckley*, 424 U.S. at 48-49, and has sometimes been characterized as a violation of the Equal Protection Clause, *see Austin*, 494 U.S. at 666-68; *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94-95 (1972). Under either analysis, however, independent justification of the discrimination is required. *Harwin*, 953 F.2d at 490 n.3.

8 Whether analyzed under the First Amendment or under the Equal Protection Clause of the Fourteenth Amendment, discriminatory burdens on First Amendment rights have typically been subjected to strict scrutiny. *Austin*, 494 U.S. at 666; *Arkansas Writers' Project*, 481 U.S. at 231; *Mosley*, 408 U.S. at 101. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling interest." *Austin*, 494 U.S. at 666.

Petitioners Holt and NCRLPAC are similarly situated with other persons (non-lobbyists) and groups (PACs who do not employ lobbyists) who, while the General Assembly is in session, exercise their First Amendment rights to political speech and association by making contributions to candidates. The Fourth Circuit erred in finding a compelling interest for treating Petitioners differently from these other persons in regard to the exercise of these rights.

As argued above, the Petitioners are no more likely than these other persons to corrupt the political process with a given size contribution. Money is money, regardless of its source. If a legislator is inclined to sell his or her vote for a given sum of money, he or she is not more likely to do so because the same sum of money is coming from a lobbyist or her employer as opposed to another person or group. *See Barker*, 841 F. Supp. at 261 (court would not "assume that lobbyists are more inclined to interfere with the integrity of the political process than other individuals.").

Furthermore, North Carolina failed to show that the danger of corruption is greater when the contribution is from a lobbyist or its employer during the legislative session than it is when the contribution is from a non-lobbyist. *See Harwin*, 953 F.2d at 491 (Ninth Circuit finding ordinance which prohibited contributions from an applicant to water board member's campaign violated the Constitution because no showing that danger of corruption was greater when contribution is from applicant).

Even if the interest in the differential treatment were compelling, the statute's means are not "closely drawn" to effect this interest. *Buckley*, 424 U.S. at 25. As noted above, the only approved compelling interest in limiting contributions is not simply "preventing corruption" (or its appearance); it is preventing "corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large financial contributions* on candidates' positions and on their actions if elected to office." *Id.*

(emphasis added). The reason is that only large contributions pose the possibility of quid pro quo corruption. *Berkeley*, 454 U.S. at 296-97.

However, North Carolina's statute does not merely prevent Petitioners from making large contributions but prevents them from making any political contributions. Such a blanket prohibition is sorely at odds with the goal of preventing the quid pro quo corruption that may flow from large financial contributions. North Carolina could not simply assume "that lobbyists are more inclined to interfere with the integrity of the political process than other[s]." *Barker*, 841 F. Supp. at 261. Nor does the fact that lobbyists are extensively regulated support this finding. *See Harriss*, 347 U.S. at 625 ("Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information. . . .").

Thus, the State did not satisfy its burden of demonstrating that, in arranging the classification at issue, it "employed means closely drawn to avoid unnecessary abridgment of [First Amendment] freedoms." *Buckley*, 424 U.S. at 25. N.C. Gen. Stat. § 163-278.13B, therefore, deprives the Petitioners of the equal protection of the laws and this Court should grant review to so hold.

VII. This Case Involves A Question Of Great Importance: Can, And To What Extent May Lobbyists Be Treated As A Prohibited Source In Their Participation In The Political Process?

North Carolina treats lobbyists and the PACs that employ them differently from the way it treats other individuals and groups. Candidates and political committees are completely barred from receiving any contributions from lobbyists and their employers during the legislative session. Moreover, in its zeal to ensure that legislators and lobbyists do not "cross the line," App. 19, North Carolina prohibited

such contributions without any evidence or legislative findings that prohibiting the exercise of the Petitioners' rights (and the rights of others) was necessary.

North Carolina's singling out of lobbyists for adverse treatment is not surprising given that lobbyists, as the voice for a limited groups of citizens, often do not have a sympathetic public persona and are often the subject of public hostility. Yet, they are no less entitled to this Court's concern. *See Austin*, 494 U.S. at 682 (Scalia, J., dissenting). Our constitutional system is designed to allow the greatest freedom of access to those that govern, so that the people may press for their selfish interest, with those that govern acting as arbiter of their demands and conflicts. *See Harriss*, 347 U.S. at 635 (Jackson, J., dissenting).

Keeping in mind lobbyists' unique contribution to the political process, Congress, in enacting federal laws to regulate lobbying, did not seek to prohibit lobbyists from contributing to candidates, but instead sought only to provide the public a modicum of information about their activities. *Id.* at 625. Indeed, regulation of lobbyist activities must be strictly scrutinized to avoid infringing upon their right to petition the government.

However, North Carolina has now lumped those that would petition the government for a redress of grievances with business corporations and federal government employees who have been uniquely barred by this Court from political participation. However,

> This case is not about rights of separate legal and economic entities, but rather about rights of individuals, whose legal and economic attributes as citizens and voters do not change by virtue of their trade [as lobbyists].

Barker, 841 F. Supp. at 259.

Thus, this Court should hear this case to determine whether North Carolina can bar such citizens from exercising the full breadth of their rights guaranteed by the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Dated: May 18, 1999

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; BARBARA HOLT, President of North Carolina Right to Life, Incorporated,

Plaintiffs-Appellees,

v.

GARY O. BARTLETT, in his official capacity as Executive Secretary-Director of the State Board of Elections of the State of North Carolina; STEVE A. BALOG, in his official capacity as District Attorney for North Carolina Prosecutorial District 15A, and as a representative of the class of District Attorneys in the State of North Carolina; MIKE EASLEY, in his official capacity as Attorney General for the State of North Carolina; JUNE K. YOUNGBLOOD, in her official capacity as a Member of the State Board of Elections; DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections,

Defendants-Appellants.

NORTH CAROLINA ALLIANCE FOR DEMOCRACY; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, INCORPORATED,

Amici Curiae.

No. 98-1636

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (CA-96-835-5-BO-1)

Argued: October 27, 1998
Decided: February 17, 1999
Entered: February 17, 1999

Before WILKINSON, Chief Judge, and ERVIN and WILKINS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Ervin and Judge Wilkins joined.

COUNSEL

ARGUED: Susan Kelly Nichols, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. James Bopp, Jr., BOPP, COLESON & BOSTROM, Terre Haute, Indiana, for Appellees. **ON BRIEF:** Michael F. Easley, North Carolina Attorney General, James Peeler Smith, Special Deputy Attorney General, Alexander McC. Peters, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellants. John K. Abegg, BOPP, COLESON & BOSTROM, Terre Haute, Indiana; Paul Stam, Jr., STAM, FORDHAM & DANCHI, Apex, North Carolina, for Appellees. James G. Exum, Jr., John J. Korzen, SMITH, HELMS, MULLISS & MOORE, Greensboro, North Carolina; Marta Nelson, Glenn Moramarco, Nancy Northup, Brennan Center for Justice, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York, for Amicus Curiae Alliance. Hugh Stevens, EVERETT, GASKINS,

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OPINION

WILKINSON, Chief Judge:

Appellees North Carolina Right to Life (NCRL), its political action committee, and its president brought suit in federal district court challenging the constitutionality of several provisions of North Carolina election and campaign finance law. The district court found for NCRL on each of its claims. North Carolina Right to Life, Inc. v. Bartlett, 3 F. Supp. 2d 675 (E.D.N.C. 1998). The State of North Carolina appeals. For the reasons that follow, we affirm in part and reverse in part.

I.

NCRL is a nonprofit corporation operating in the State of North Carolina. NCRL has as a purpose the protection of human life. In furtherance of that purpose, it provides information to the public about abortion and euthanasia. NCRL is not associated with any political candidate, political party, or campaign committee. Nor is one of NCRL's major purposes to nominate, elect, or defeat specific candidates for public office or to pass or defeat ballot measures. In other words, NCRL does not engage in "express advocacy" -- advocacy "that in express terms [calls for] the election or defeat of a clearly identified candidate for . . . office." Buckley v. Valeo, 424 U.S. 1, 44 (1976) (per curiam). Rather, NCRL engages in "issue advocacy" -- the discussion of issues of public concern, including candidates' positions on those issues -- by, among other means, distributing voter guides to the general public. Thus, issue advocacy may

influence an election even though it does not expressly advocate the election or defeat of a particular candidate or party. See Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268, 270 (4th Cir. 1998).

NCRL created North Carolina Right to Life Political Action Committee (NCRLPAC) to engage in express advocacy consistent with NCRL's views. NCRLPAC, therefore, does have as a primary purpose supporting or opposing specific candidates and political parties. Toward that end, NCRLPAC contributes money to the campaigns of candidates with whom it agrees and makes "independent expenditures" -- expenditures made independently of candidates that finance an express call for their election or defeat -- to support them. NCRL's president, Barbara Holt, oversees the operations of both NCRL and NCRLPAC. Holt is also a registered lobbyist in the State of North Carolina.

While preparing for North Carolina's 1996 general election, NCRL became concerned that some of the activities in which it wished to engage might violate North Carolina's election law. Specifically, NCRL worried that it might be considered a "political committee" under North Carolina law if it were to distribute its voter guide. N.C. Gen. Stat. § 163-278.6(14). If NCRL were a political committee, it would need to register as such, keep detailed accounts of its expenditures and contributions, and regularly file organizational and financial reports with the State. Id. §§ 163-278.7(b), .8, .9, .11. If NCRL failed to satisfy these requirements, its officers would be subject to criminal penalties. Id. §§ 163-278.27, .34.

In addition, NCRL was concerned that, by publishing its voter guide, it might violate the provision prohibiting corporations from making any contributions or expenditures for a "political purpose," id. §§ 163-269, -278.19, which the statute defines as any attempt to "influence an election," id. § 163-278.6(16). Were the State to determine that NCRL's voter guide was for a political purpose, NCRL's officers

would be similarly subject to criminal penalties. Id. §§ 163-269, -278.19(c).

To determine whether it would violate these provisions by distributing a voter guide, NCRL twice wrote to Yvonne Southerland, Chief Deputy Director of the State Board of Elections, to request her opinion. Along with each letter, NCRL sent a sample voter guide. The first sample guide inadvertently contained a one-page candidate endorsement list -- i.e., express advocacy -- prepared by NCRLPAC. Southerland informed NCRL that the distribution of this voter guide would violate the State's prohibition against corporate expenditures for a political purpose. Southerland also stated more generally that any expenditure for a political purpose would make NCRL a political committee. Realizing that its first sample voter guide accidentally contained NCRLPAC's express advocacy, NCRL sent a second letter to Southerland and attached a voter guide without any candidate endorsements. In this second letter, NCRL asked only whether the distribution of this second guide would violate North Carolina's prohibition against corporate expenditures for a political purpose. Southerland again answered affirmatively.

NCRL, NCRLPAC, and Holt then brought suit in federal district court challenging several provisions of North Carolina's election law. They named as defendants the members of the State Board of Elections, the State Attorney General, and the district attorney for the prosecutorial district in which Holt lives. First, NCRL challenged North Carolina's definition of political committee on the ground that it includes entities that engage in issue advocacy only. Id. § 163-278.6(14). Second, it challenged the State's total ban on corporate expenditures for a political purpose because it prohibits NCRL from engaging in both issue advocacy and express advocacy. Id. §§ 163- 269, -278.6(16), -278.19. Third, NCRLPAC and Holt challenged the provision prohibiting lobbyists, and the political committees that employ them, from contributing to members and candidates

for the General Assembly and Council of State while the General Assembly is in session. Id. § 163-278.13B(c). They also challenged the provision prohibiting members and candidates for the General Assembly and Council of State from soliciting contributions from lobbyists and the political committees that employ them. Id. § 163-278.13B(b). Finally, NCRLPAC objected to North Carolina's requirement that all political committees provide prospective donors with the name of the candidate for whom the money will be used. Id. § 163-278.20(a). On each of their claims, NCRL, NCRLPAC, and Holt sought declaratory and injunctive relief.

With respect to North Carolina's definition of political committee, the district court declared section 163-278.6(14) to be unconstitutional because it defines as political committees those entities that engage in issue advocacy as well as express advocacy. NCRL, 3 F. Supp. 2d at 679-80. With regard to North Carolina's ban on corporate contributions and expenditures, the district court declared it to be unconstitutional because it prohibits all corporations, including nonprofits, from making expenditures for a political purpose. Id. at 681. As to North Carolina's prohibition on lobbyists and the political committees that employ them contributing to candidates and incumbents during the General Assembly session, the district court declared section 163-278.13B unconstitutional as an undue burden on Holt's and NCRLPAC's First Amendment rights. Id. at 682. Finally, with respect to North Carolina's requirement that political committees alert donors of the use to which their donation will be put, the district court granted NCRLPAC a declaratory judgment that it need only alert prospective donors of its name and need not tell them for whom the money will be used. Id. at 677. North Carolina now appeals.

II.

The State argues initially that no case or controversy exists with respect to several of the provisions NCRL and NCRLPAC challenge. Initially, the State claims that, irrespective of the statute's plain language, it interprets the definition of political committee in section 163-278.6(14) to allow NCRL to distribute a voter guide free of candidate endorsements, or to engage in other forms of issue advocacy, without registering or filing the required reports. Indeed, the State points out that in the twenty-five years since the statute's enactment, it has never interpreted it to apply to groups engaging only in issue advocacy. Consequently, NCRL proffers nothing more than a hypothetical risk of prosecution under section 163-278.6(14).

We disagree. When a plaintiff faces a credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute. See Doe v. Bolton, 410 U.S. 179, 188 (1973). A non-moribund statute that "facially restrict[s] expressive activity by the class to which the plaintiff belongs" presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary. New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8, 15 (1st Cir. 1996). This presumption is particularly appropriate when the presence of a statute tends to chill the exercise of First Amendment rights. See Wilson v. Stocker, 819 F.2d 943, 946 (10th Cir. 1987).

Section 163-278.6(14) appears by its terms to apply to NCRL. North Carolina law provides that any entity "the primary or incidental purpose of which is to . . . influence or attempt to influence the result of an election," N.C. Gen. Stat. § 163-278.6(14), must register and file certain reports with the State, or its officers risk criminal prosecution. Since the record in this case demonstrates that NCRL has distributed voter guides -- which attempt to influence elections -- the statute facially restricts "expressive activity

by the class to which the plaintiff belongs." Gardner, 99 F.3d at 15.

More importantly, NCRL has stated that it wants to distribute these guides in the future, and would do so but for its fear that it would fall within North Carolina's definition of political committee. To determine whether that fear was well-founded, NCRL wrote the State Board of Elections. The State did not indicate that it would interpret the statute to mean anything other than what its plain language would suggest. As a result, NCRL refrained from disseminating its guide, and its speech was chilled.

The State's litigation position -- that it does not interpret section 163-278.6(14) to encompass issue advocacy -- fails to alter our analysis in this case. The record does not indicate that the Board has promulgated a rule exempting from its definition of political committee those entities that engage in issue advocacy only. See, e.g., Wisconsin Right to Life, Inc. v. Paradise, 138 F.3d 1183, 1185 (7th Cir.), cert. denied, 119 S. Ct. 172 (1998). Nor does the record indicate that the local district attorneys have any intention of refraining from prosecuting those who appear to violate the plain language of the statute. See id.

NCRL is left, therefore, with nothing more than the State's promise that NCRL's officers will face no criminal penalties if NCRL distributes its voter guide without registering as a political committee. NCRL's First Amendment rights would exist only at the sufferance of the State Board of Elections. It has no guarantee that the Board might not tomorrow bring its interpretation more in line with the provision's plain language. Without such a guarantee, NCRL will suffer from the reasonable fear that it can and will be prosecuted for failing to register and file the necessary disclosures, and its constitutionally protected speech will be chilled as a result.

This same analysis applies to the State's argument that no case or controversy exists with respect to its prohibition on corporate contributions and expenditures for a

political purpose. See N.C. Gen. Stat. §§ 163-269, -278.6(16), -278.19. As noted, section 163-278.6(16) defines political purpose to include seeking to influence an election -- language which certainly appears to cover NCRL's endorsement-free voter guide. More importantly, in its response to NCRL's second letter, the State indicated that it would consider NCRL's endorsement-free guide to be for a political purpose and therefore prohibited by sections 163-269 and 163-278.19. Again, the only thing standing in the way of a criminal prosecution is the State's litigation position that it will voluntarily refrain from enforcing the statute according to its plain language.

Finally, the State claims that no case or controversy exists with regard to section 163-278.20(a). Section 163-278.20(a), in relevant part, requires "any group" or "committee" soliciting contributions to advise those solicited of either the name of the candidate for whom the funds will be used, id. § 163-278.20(a)(1), the name of the political committee or party for which they will be used, id. § 163-278.20(a)(2), or that a decision will be reached as to the candidate, committee, or party to be supported at some later date no later than twenty days prior to the upcoming primary or general election, id. § 163-278.20(a)(3). Section 163-278.20(b) provides that a violation of this provision is a criminal offense.

The State argues that only section 163-278.20(a)(2) applies to NCRLPAC, and that it interprets that section to require political committees such as NCRLPAC to do nothing more than identify themselves when they solicit funding. In a prior interpretive letter, however, the State informed another political committee that it must comply with each subsection of 163-278.20(a) -- not just (a)(2). Consequently, as was true with respect to NCRL above, NCRLPAC is protected from possible prosecution by nothing more than the State's post-suit position that the section does not apply as its plain language would suggest.

In sum, this case presents a statute aimed directly at plaintiffs who "will have to take significant . . . compliance measures or risk criminal prosecution." Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383, 392 (1988). In such a circumstance, courts have long recognized that the statute's mere existence risks chilling First Amendment rights. Indeed, in this case, NCRL has discontinued distributing its voter guide and NCRLPAC has stopped soliciting without providing a disclaimer because of a credible threat of prosecution. Consequently, a case or controversy inheres in each provision.[1]

III.

We next proceed to the merits of NCRL, NCRLPAC, and Holt's constitutional challenges. Section 163-278.6(14) defines political committee as "a combination of two or more individuals, or any person, committee, association, or

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[1] The State also argues that we should abstain from ruling on appellees' claims concerning sections 163-269, 163-278.6(14), and 163-278.19 because no state court has construed these provisions and such a construction may either render unnecessary this court's constitutional determination or substantially alter the questions before us. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Recognizing that North Carolina has no procedure by which we may certify these questions to its Supreme Court, the State suggests that we solicit the State Board of Elections for its interpretation of these provisions under section 163-278.23. N.C. Gen. Stat. § 163-278.23. Quite apart from the problem of applying Pullman abstention to the unauthoritative declarations of a state administrative body, section 163-278.23 provides no mechanism for a federal court to certify a question to the Board. And in all events, courts "have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment," City of Houston v. Hill , 482 U.S. 451, 467 (1987), because the delay involved "might itself effect the impermissible chilling of the very constitutional right [the litigant] seeks to protect," Zwickler v. Koota, 389 U.S. 241, 252 (1967). Consequently, abstention in this case is inappropriate.

organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election." N.C. Gen. Stat. § 163-278.6(14). The consequences of finding NCRL a political committee are substantial -- NCRL would be required to register as such, keep detailed records of its expenditures and contributions, and file organizational and financial reports with the State. Id. §§ 163-278.7(b), .8, .9, .11.

The district court found section 163-278.6(14)'s definition of political committee to be impermissibly broad because it includes groups such as NCRL that engage in issue advocacy only. NCRL, 3 F. Supp. 2d at 679-80. The State appeals, claiming that the district court should have narrowly construed North Carolina's definition of political committee so as not to include groups that only engage in issue advocacy.

Specifically, the State requests that we follow the path of the Supreme Court which in Buckley v. Valeo narrowly construed a similar provision. In Buckley, the Supreme Court addressed a provision that required any entity falling within the Federal Election Campaign Act's (FECA) definition of "political committee" to make certain disclosures to the federal government. FECA defined a political committee as any entity making contributions or expenditures above a certain amount "for the purpose of . . . influencing" the nomination or election of individuals to federal office. Buckley , 424 U.S. at 63. The Court held that, without a narrowing construction, the general requirement that political committees "disclose their expenditures could raise . . . vagueness problems, for `political committee' is defined [in such a way that it] could be interpreted to reach groups engaged purely in issue discussion." Id. at 79.

To save the provision from being unconstitutionally vague, the Court defined political committee as including only those entities that have as a major purpose engaging in express advocacy in support of a candidate, id., by using

words such as"vote for," "elect," "support," "vote against," "defeat," or "reject," id. at 44 n.52. Otherwise, "absent the bright-line limitation, the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled." FEC v. Christian Action Network, 110 F.3d 1049, 1051 (4th Cir. 1997) (emphasis omitted).

The question then is whether we may similarly construe North Carolina's definition of political committee to save it from being void for vagueness. We cannot. Two crucial differences exist between section 163-278.6(14) and the provisions of FECA at issue in Buckley. First, unlike the provisions of FECA, North Carolina's definition expressly sweeps within its ambit those groups that only incidentally engage in express advocacy. This is a much broader definition of political committee than that at issue in Buckley, and to save it would require quite a stretch -- in fact, we would have to excise the word "incidental" from the statute.

Second, the North Carolina definition of political committee covers groups engaging in issue advocacy by explicitly juxtaposing express and issue advocacy, and thereby indicating that it encompasses both. Specifically, the definition covers any group "the primary or incidental purpose of which is to support or oppose any candidate . . . or to influence or attempt to influence the result of an election." N.C. Gen. Stat. § 163-278.6(14) (emphasis added). The only reasonable reading of this definition is that political committee encompasses both entities that have as a primary or incidental purpose supporting a candidate -- i.e., engaging in express advocacy -- and those that merely wish to influence an election -- i.e., engage in issue advocacy. To accept the State's proffered interpretation would read the references to influencing elections (a classic form of issue advocacy) right out of the statute.

Without the benefit of a narrowing construction, section 163-278.6(14) is unconstitutionally vague and overbroad. See Buckley, 424 U.S. at 79-80. The statute subjects groups engaged in only issue advocacy to an intrusive set of reporting requirements. In so doing, it "blankets with uncertainty" the entire field of campaign politics "compel[ling] the speaker to hedge and trim." Thomas v. Collins, 323 U.S. 516, 535 (1945). Burdening speech of this sort is unacceptable in an area of such crucial import to our representative democracy. The district court was correct in finding section 163-278.6(14) facially unconstitutional, and we affirm its judgment.

IV.

North Carolina prohibits corporate expenditures or contributions for a political purpose. N.C. Gen. Stat. §§ 163-269, -278.6(16), -278.19. Sections 163-269 and 163-278.19 prohibit corporations from making "any contribution or expenditure . . . for any political purpose whatsoever." Section 163-278.6(16) defines "political purpose" in relevant part as "any purpose in aid of seeking to influence an election." Because North Carolina's ban on corporate expenditures makes no exception for nonprofit corporations, the district court declared sections 163-269, 163-278.6(16), and 163-278.19 to be unconstitutionally overbroad. NCRL, 3 F. Supp. 2d at 681. The State appeals.

The Supreme Court has recognized that, in the realm of campaign politics, "the special characteristics of the corporate structure require particularly careful regulation." FEC v. National Right to Work Comm., 459 U.S. 197, 209-10 (1982). The economic advantages of the corporate form such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" all enhance a corporation's ability "to attract capital and to deploy . . . resources." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658-59 (1990). These advantages

enable corporations to create enormous "war chests" and "to incur political debts from legislators who are aided by [their] contributions" and expenditures. National Right to Work Comm., 459 U.S. at 207. The danger, of course, is that there is no guarantee that any relationship exists between the amount of corporate expenditures in favor of a position and the popularity of that position with the public at large. FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 258 (1986) [hereinafter MCFL]. Recognizing this, the Supreme Court has, in some circumstances, upheld complete prohibitions on both corporate political contributions, National Right to Work Comm., 459 U.S. 197, and independent expenditures, Austin, 494 U.S. 652.

Nevertheless, the Court has been careful to note that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." MCFL , 479 U.S. at 259. Moreover, such a concern is not omnipresent. For instance, in MCFL, the Court considered a prohibition on corporate expenditures in connection with federal elections. MCFL, like NCRL, was a nonprofit corporation founded for the purpose of fostering respect for human life by opposing abortion. MCFL did not accept contributions from for-profit corporations. MCFL, 479 U.S. at 242.

After reiterating its general concern with the distorting effect of the corporate form in politics, the Court held that its analysis with respect to corporate expenditures must be more nuanced. Specifically, it held that MCFL was sufficiently distinct from the traditional for-profit corporation. First, MCFL could not engage in for-profit activity, and it was created simply to disseminate political ideas. Second, it had no shareholders or other persons who held a claim on its assets or earnings. Finally, it was not established by a business or a labor union, and it had a policy of refusing to accept contributions from either type of entity. Such organizations, the Court held, do not pose the same

dangers to the political system since they are organized to promote a political message and their revenues typically reflect the public's support of that message. Id. at 264.

Like the federal election law in MCFL, North Carolina's law makes no exception for nonprofits that present a minimal risk of distorting the political process. Rather, it bars all corporations from making any expenditures and contributions for a political purpose. As such, it is substantially overbroad and thus unconstitutional.

The State, in an apparent last-ditch effort to save its statute, argues that NCRL is ineligible for the MCFL exception because, unlike MCFL, NCRL has no policy against accepting contributions from for-profit corporations. Indeed, from 1993 to 1995, NCRL's contributions from such entities fluctuated from zero to eight percent of its overall revenues.

We do not think this modest percentage of revenue disqualifies NCRL for the nonprofit exemption to North Carolina's ban on corporate expenditures. We agree with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in MCFL was not "a constitutional test for when a nonprofit corporation must be exempt," but"an application, in three parts, of First Amendment jurisprudence to the facts in MCFL." Day v. Holahan, 34 F.3d 1356, 1363 (8th Cir. 1994); see also FEC v. Sur-vival Educ. Fund, Inc., 65 F.3d 285, 292 (2d Cir. 1995). The crucial question is not whether NCRL has a policy against accepting corporate contributions, but whether its acceptance of those contributions means that it is serving as a conduit "for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace." MCFL, 479 U.S. at 264.

Such is clearly not the case with respect to NCRL. Those corporate contributions it has received are but a fraction of its overall revenues. In addition, the contributions are not of the traditional form. They are instead part of a

program by which phone company customers may direct their phone bill refunds to a nonprofit of their choice. Consequently, while these contributions technically come from the phone company, they in fact result from the decisions of individual phone company customers. Moreover, NCRL displays all the typical characteristics of the nonprofit form -- it does not engage in profit-making activity, it has no shareholders or other persons who might have a claim on its assets and earnings, and it is exempt from federal income taxation. As a result, NCRL falls squarely within the MCFL exception. And because North Carolina law fails "to distinguish between corporations which pose a threat to the integrity of the political process and those which do not," we agree with the district court that sections 163-269, 163-278.6(16), and 163-278.19 are unconstitutionally overbroad. NCRL, 3 F. Supp. 2d at 680.

V.

Section 163-278.13B prohibits a lobbyist, a lobbyist's agent, or a political committee that employs a lobbyist from contributing to a member of or candidate for the North Carolina General Assembly or Council of State while the General Assembly is in session. N.C. Gen. Stat. § 163-278.13B(c). It also prohibits candidates or incumbents from soliciting lobbyists or political committees that employ them during the session. Id. § 163-278.13B(b). Violation of these restrictions carries a criminal penalty. Id. § 163-278.13B(e). The record indicates that the General Assembly was in session for one to two months for most of the years from 1975 to 1997 in which an election was held. In 1998 it apparently extended its session, and in nonelection years it routinely meets for a longer period of time. When the General Assembly is not in session, lobbyists and political committees may contribute up to $4,000 per election to any candidate. Id. § 163-278.13(a).

Holt and NCRLPAC challenged North Carolina's prohibition on lobbyist and PAC contributions to members and candidates for the General Assembly while it is in session. They also challenged North Carolina's solicitation restriction.[2] The district court struck section 163-278.13B as violating the First Amendment. NCRL, 3 F. Supp. 2d at 682. We hold, however, that North Carolina can constitutionally enact the limited restrictions on lobbyist and political committee contributions embodied in sections 163-278.13B(b) and (c).

A.

Initially, appellees argue that section 163-278.13B impermissibly burdens their First Amendment rights of speech and association. Appellees are correct that political contribution limits do implicate one's speech and association rights. See Buckley , 424 U.S. at 14-15, 24-25. As such, courts have applied strict scrutiny to such limits. See, e.g., Carver v. Nixon, 72 F.3d 633, 637 (8th Cir. 1995). Nevertheless, it is settled that "[n]either the right to associate nor the right to participate in political activities is absolute." CSC v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973). In fact, the activities of lobbyists are extensively regulated. See, e.g., Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-1612 (requiring lobbyists to make detailed disclosures related to their lobbying efforts).

Moreover, the Supreme Court has long noted that restrictions on political contributions are constitutionally less problematic than are, for instance, restrictions on independent expenditures. See Buckley, 424 U.S. at 20-21.

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[2] We cannot accept the State's argument that appellees have no standing to challenge North Carolina's solicitation restriction because they are not members of or candidates for the General Assembly or Council of State. North Carolina's solicitation restriction is inextricably intertwined with its contribution limitation. Indeed, the two are the mirror reflection of one another.

This lesser concern springs from the fact that contribution limits typically "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." Id. Such is the case here. North Carolina's restrictions do nothing more than place a temporary hold on appellees' ability to contribute during the General Assembly session, leaving them free to contribute during the rest of the calendar year and to engage in political speech for the entire year.

North Carolina's contribution and solicitation restrictions also survive strict scrutiny because they advance a compelling state interest. Prohibiting lobbyist contributions and solicitations while the General Assembly is in session serves to prevent corruption and the appearance of corruption -- "the only legitimate and compelling government interests thus far identified for restricting campaign finances." FEC v. National Conservative PAC, 470 U.S. 480, 496-97 (1985); see also Buckley v. American Constitutional Law Found., Inc., 119 S. Ct. 636, 648 (1999)(noting the risk of quid pro quo corruption "when money is paid to, or for, candidates"). Legislative action which is procured directly through gifts, or even campaign contributions, too often fails to reflect what is in the public interest, what enjoys public support, or what represents a legislator's own conscientious assessment of the merits of a proposal.

Appellees respond that the compelling interest the Court identified in Buckley was not the prevention of corruption or its appearance generally, but the prevention of only that corruption or appearance of corruption that results from large contributions by individuals. Holt and NCRLPAC, however, define the interest too narrowly. Corruption, either petty or massive, is a compelling state interest because it distorts both the concept of popular sovereignty and the theory of representative government.

In evaluating the state interest in this case, we find a genuine risk of both actual corruption and the appearance of corruption. With respect to actual corruption, lobbyists are

paid to effectuate particular political outcomes. The pressure on them to perform mounts as legislation winds its way through the system. If lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange "dollars for political favors" can be powerful. National Conservative PAC, 470 U.S. at 497.

Illicit bargaining of this type is not limited to the old days when trusts shopped state legislatures like children in a candy store. More recent cases of improper activity, unfortunately, also exist. Indeed, courts have recognized instances of influence peddling, Maryland Right to Life State PAC v. Weathersbee, 975 F. Supp. 791, 797 (D. Md. 1997), political quid pro quos, United States v. Nelson, 486 F. Supp. 464, 468 (W.D. Mich. 1980), and other improper behavior on the part of legislators, United States v. Bailey , 990 F.2d 119, 121 (4th Cir. 1993) (detailing personal cash payments for support of parimutuel betting legislation); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 639 (6th Cir.) ("Numerous Kentucky public officials have been convicted of abusing their political offices for personal gain over the past twenty-five years."), cert. denied , 118 S. Ct. 162 (1997). While lobbyists do much to inform the legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action.

The appearance of corruption resulting from PAC and lobbyist contributions during the legislative session can also be corrosive. Even if lobbyists have no intention of directly"purchasing" favorable treatment, appearances may be otherwise. The First Amendment does not prevent states such as North Carolina from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy. See Buckley, 424 U.S. 26-27.

Toward these ends, North Carolina enacted narrowly tailored restrictions. First, the restrictions in section 163-278.13B are limited to lobbyists and the political committees that employ them -- the two most ubiquitous and powerful players in the political arena. Second, the restrictions are temporally limited: they last only during the legislative session, which typically, though not invariably, has covered just a few months in an election year. In short, the restrictions cover only that period during which the risk of an actual quid pro quo or the appearance of one runs highest.

Holt and NCRLPAC counter that the limitations are not narrowly tailored for two reasons. First, they maintain that the restrictions cover any contribution, not just those large enough to support a potential quid pro quo. But a "court has no scalpel to probe" such fine distinctions. Buckley, 424 U.S. at 30 (internal quotation marks omitted). And even were we able to distinguish those dollar amounts that are sufficient to support actual purchases of political favors from those that are not, the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution. Courts simply are not in the position to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." National Right to Work Comm., 459 U.S. at 210.

Second, Holt and NCRLPAC claim the restrictions are not narrowly tailored because they prevent candidates for office from receiving contributions even though candidates are in no position to sell legislative outcomes. Appellees' argument might be persuasive were contributions to incumbents the only way to gain favorable treatment. But sticks can work as well as carrots, and the threat of contributing to a legislator's challenger can supply as powerful an incentive as contributing to that legislator himself.

Finally, appellees argue that North Carolina's restrictions are constitutionally infirm because they allegedly make fundraising a more difficult proposition for challengers than it is for incumbents. The restrictions work a particular disadvantage upon challengers, so the argument runs, because they effectively deprive them of a major funding source in the critical months leading up to an election or primary. Incumbents, by contrast, would allegedly benefit from a huge infusion of contributions shortly after the General Assembly session ends.

This precise argument was squarely rejected by the Supreme Court in Buckley. In Buckley, the Court faced a provision of FECA that limited to $1000 the contribution any one person could make to any candidate with respect to a federal election. 424 U.S. at 23-24. The plaintiffs in Buckley argued that the FECA limitation was unconstitutional because it allegedly made fundraising more difficult for challengers vis a vis incumbents. Id. at 30-31. In rejecting plaintiffs' claim, the Court found important the fact that FECA, like North Carolina's restriction, "applies the same limitations on contributions to all candidates" -- incumbents and challengers alike. Id. at 31. Indeed, the Court emphasized that "[s]ince the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both." Id. at 33 (emphasis added). In addition, the Court took issue with the plaintiffs' claim that fundraising is necessarily more difficult for challengers. It noted that "major-party challengers as well as incumbents are capable of raising large sums for campaigning" and that "a small but nonetheless significant number of challengers have in recent elections outspent their incumbent rivals." Id. at 32. Finally, as a practical matter, the Court's view was informed by the realization that if challengers and incumbents were required to play by different sets of campaign finance rules, few reforms would be likely to win legislative enactment.

B.

Appellees also claim that section 163-278.13B violates the Fourteenth Amendment because it treats lobbyists and political committees differently than it does the general population with respect to their fundamental right to associate. As the preceding section notes, however, the State has advanced strong reasons for doing so -- reasons that the Supreme Court has in fact expressly validated. National Conservative PAC, 470 U.S. at 496-97.

C.

Appellees' last challenge to section 163-278.13B is equally unavailing. Holt and NCRLPAC argue that the provision impermissibly forces lobbyists to forego their constitutional right to petition the government for a redress of grievances if, during the General Assembly session, they wish to exercise their First Amendment right to associate by contributing to candidates and incumbents. They argue that such a system creates an "intolerable [situation in which] one constitutional right [must] be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968).

As an initial matter, it is instructive to note that Holt's position is in many respects similar to that of federal employees. Under the Hatch Act, one must forego certain rights to participate in the political process if one wishes to take federal employment. Despite the obvious trade-off such a scheme forces prospective federal employees to make, the Supreme Court has upheld the Hatch Act's restrictions as constitutional. Letter Carriers, 413 U.S. 548.

More generally, "[n]either the right to associate nor the right to participate in political activities is absolute." Letter Carriers, 413 U.S. at 567. When the interests sought to be advanced by the statutory scheme are sufficiently important, minimal burdens on one's right to associate are

constitutional. Id. at 564-65. Not only are the interests served by North Carolina's statutory scheme important, they are compelling. Moreover, the burden on appellees' right to associate is minimal. Appellees are not prevented from contributing to the candidates and incumbents of their choice, they are only restrained from doing so while the Assembly is in session.

In conclusion, this effort on the part of a state legislature to protect itself from the damaging effects of corruption should not lightly be thwarted by the courts. Here, the proper judicial posture should be one of restraint. The Constitution does not prevent this attempt on the part of North Carolina to preserve the integrity of and maintain public confidence in its legislative process. In the end, North Carolina law does nothing more than recognize that lobbyists are paid to persuade legislators, not to purchase them.

VI.

The following represents a summation of our holdings. We hold North Carolina's definition of political committee in section 163-278.6(14) to be unconstitutionally vague and overbroad, and we affirm the judgment of the district court. North Carolina's prohibition on corporate expenditures and contributions in sections 163-269, 163-278.6(16), and 163-278.19 is substantially overbroad, and we again affirm the district court. Finally, the State's contribution and solicitation limitations set forth in section 163-278.13B are constitutional, and we thus reverse the district court.[3]

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[3] Before the trial court, NCRLPAC also challenged North Carolina's requirement that political committees provide donors with the name of the candidate for whom their contribution would be used. N.C. Gen. Stat. § 163-278.20(a). The district court granted NCRLPAC a declaratory judgment that section 163-278.20(a) requires it merely to provide prospective donors with its own name. NCRL, 3 F. Supp. 2d at 677. On appeal, the State challenges only the presence of a case or controversy -- it offers no objection to the merits of the district court's

Each of the provisions we strike works in its own way to impede the free and open discussion of issues and candidates that sustains our ability as citizens to control our own destiny. The one provision we do uphold is a reasonable measure to ensure that this free and open debate does not go for naught.

The judgment of the district court is hereby

AFFIRMED IN PART AND REVERSED IN PART.

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decision. As noted, a case or controversy does exist with regard to this section. We agree with the district court that NCRLPAC cannot be required to identify to potential contributors the names of specific candidates or parties for whom the contributions will be used.

NORTH CAROLINA RIGHT TO LIFE, INC. North Carolina Right to Life Political Action Committee, and Barbara Holt, President of North Carolina Right to Life, Inc.,

Plaintiffs,

v.

Gary O. BARTLETT, in his official capacity as Executive Secretary-Director of the State Board of Elections of the State of North Carolina; Steve Balog, in his official capacity as District Attorney for North Carolina Prosecutorial District 15A; Mike Easley, in his official capacity as Attorney General for the State of North Carolina; Larry Leake, in his official capacity as Chairman of the State Board of Elections; S. Katherine Burnette, in her official capacity as a Member of the State Board of Elections; Faiger M. Blackwell, in his official capacity as a Member of the State Board of Elections; June K. Youngblood, in her official capacity as a Member of the State Board of Elections; and Dorothy Presser, in her official capacity as a Member of the State Board of Elections,

Defendants.

No. 5:96-CV-835-BO(1).

United States District Court, E.D. North Carolina.

Entered: April 29, 1998.

Non-profit corporation, its political action committee (PAC), and corporation's president brought action challenging constitutionality of North Carolina statutes regulating political contributions. On cross-motions for summary judgment, the District Court, Terrence William Boyle, Chief Judge, held that: (1) statute defining term

"political committee," for purposes of requirements that such committees register with state or face criminal penalties, denied full First Amendment protection to individuals and groups engaged in issue advocacy; (2) statutes barring any contributions by corporations were facially overbroad and violated First Amendment; and (3) statute prohibiting legislators or candidates from soliciting contributions from lobbyists while General Assembly was in session was not narrowly tailored and was unconstitutional.

Plaintiffs' motion granted, and defendants' motion denied.

James Bopp, Jr., Dale L. Wilcox, John K. Abegg, Bopp, Coleson & Bostrom, Terre Haute, IN, Paul Stam, Jr., Stam, Fordham & Danchi, Apex, NC, for plaintiffs.

James Peeler Smith, Alexander McC. Peters, Susan K. Nichols, Special Deputy Attorneys General, Raleigh, NC, for defendants.

ORDER

TERRENCE WILLIAM BOYLE, Chief Judge.

This matter is before the Court on the parties' Motions for Summary Judgment and Defendants' Motion to Certify Questions and to Abstain. In the underlying action, Plaintiffs challenge provisions of North Carolina's election laws regulating political contributions and expenditures by corporations, political committees, and individuals, and seek an injunction against enforcement of the challenged provisions. For the reasons discussed below, Plaintiffs' Motion for Summary Judgment will be granted, and Defendants' Motions for Summary Judgment and to Certify Questions and to Abstain will be denied.

BACKGROUND

Plaintiff North Carolina Right to Life, Inc. (hereinafter, "NCRL"), is a non- profit corporation organized under Chapter 55A of the North Carolina General Statutes. NCRL produces voter guides and other election materials that it distributes to its members and the general public. Verified Complaint at ¶ 29. Plaintiff North Carolina Right to Life Political Action Committee ("NCRLPAC") was established by NCRL as a segregated fund through which NCRL makes contributions to candidates and engages in other activities that support or oppose the elections of identified candidates. Plaintiff Barbara Holt ("Holt") is a registered lobbyist, a principal agent of NCRL and NCRLPAC, and the president of NCRL.

Plaintiffs commenced this action on September 27, 1996, by filing a complaint seeking declaratory and injunctive relief and challenging the constitutionality of various provisions of the North Carolina General Statutes regulating election campaign financing. Plaintiffs filed an amended complaint on December 5, 1997, and now argue that sections 163-278.6(14) (defining "political committee"), 163-269, et seq. ("Violations by corporations"), 163-278.19 (corporate contributions for "political purpose"), and 163-278.13B ("Limitation on fundraising during legislative session"), as amended, violate the Plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution by infringing protected political speech and association and by denying them the equal protection of the law.

This Court held a hearing on this matter on October 15, 1996, and issued a Declaratory Judgment on February 7, 1997. Both parties subsequently moved for summary judgment. Defendants also filed a Motion to Certify Questions pursuant to section 163-278.23 of the North

Carolina General Statutes, urging this Court to abstain from ruling on these questions pending an authoritative interpretation of the challenged statutes from the Executive Secretary-Director of the State Board of Elections. Another hearing was held on November 24, 1997, and the parties' motions are ripe for ruling.

DISCUSSION

I. Defendants' Motion to Certify Questions to the Board of Elections

[1] [2] North Carolina has no legislative authority for certifying questions of state law to the highest state court for decision. The Defendants' argument that this Court should adopt such a procedure in the absence of legislative authority is without merit. There is no basis for abstention in this Court, and this Court is under a duty to rule on issues of federal and constitutional law when they are properly presented to it. The motion to certify will be denied.

II. Motions for Summary Judgment

[3] Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(c). To avoid summary judgment, the opposing party must introduce evidence to create an issue of material fact on "an element essential to the party's case, and on which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A verified complaint based on personal knowledge is the equivalent of an affidavit for summary judgment purposes. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir.1991).

In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Supreme Court emphasized that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " Id., at 14, 96 S.Ct., at 632 (quoting Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498 (1957)). The Supreme Court expressly noted that money spent on political campaigns, whether involving candidates or issues, is a form of political expression and thus entitled to First Amendment protection. Id., at 19, 96 S.Ct., at 634-635.

The Buckley Court, considering the constitutionality of limits on campaign contributions and expenditures in the Federal Election Campaign Act of 1971 ("FECA"), distinguished between these two categories of political expression. A limitation on contributions to candidates, the Court held, "involves little direct restraint on ... political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." Id., at 21, 96 S.Ct., at 636. FECA's expenditure limitations, on the other hand, were struck down for placing "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." Id., at 58-59, 96 S.Ct., at 654.

Since Buckley, the Supreme Court has held that statutes regulating political expenditures are subject to "exacting scrutiny," McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 344-46, 115 S.Ct. 1511, 131 L.Ed.2d 426, and that States may not infringe upon such expression absent a compelling state interest, Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256, 107

S.Ct. 616, 627, 93 L.Ed.2d 539 (1986) ("MCFL"); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657, 110 S.Ct. 1391, 1396, 108 L.Ed.2d 652 (1990). The Court has also held that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 496-497, 105 S.Ct. 1459, 1468, 84 L.Ed.2d 455 (1985).

The Buckley Court also drew a distinction between "express advocacy"--communication which advocates in express terms the election or defeat of a clearly identified candidate,[1] 424 U.S., at 44, 96 S.Ct., at 646-647-and "issue advocacy"--which encompasses any other type of political communication expressing one's views on issues without expressly calling for a candidate's election or defeat, id. Statutes which regulate campaign expenditures may regulate express advocacy in the interest of preventing actual or apparent corruption, but may not regulate spending on issue advocacy. Id., at 43-44, 96 S.Ct., at 646-647.

Finally, the Supreme Court has held that a statute may be infirm for overbreadth "when [it] does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." Thornhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940). Specifically in the First Amendment context, the Supreme Court has long recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give

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[1] The Buckley Court described "express words of advocacy" as terms including "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." 424 U.S., at 44 n. 52, 96 S.Ct., at 647 n. 52.

way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973). Thus, overbreadth attacks have been allowed where rights of speech and association "were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations." Id., at 612, 93 S.Ct., at 2916.

With these distinctions and definitions in mind, the Court will review the North Carolina statutes challenged by the Plaintiffs.

A. The definition of "Political committee" in section 163-278.6(14)

[4] The North Carolina election laws define a "political committee" as "any person, committee, association, or organization, the primary or incidental purpose of which is to support or oppose any candidate or political party or to influence or attempt to influence the result of an election...." N.C.Gen.Stat. § 163-278.6(14). Classification as a "political committee" requires an entity to register as such and to comply with the requirements of sections 163-278.7(b) (filing a statement of organization with the Board of Elections), 163-278.8 (keeping detailed accounts of expenditures and contributions), and 163-278.9 and 163-278.11 (regular filing of organizational and financing reports). Failure to comply with these requirements carries criminal penalties. See N.C.Gen.Stat. §§ 163-278.27 and 163-278.34.

In construing the FECA in Buckley, the Supreme Court noted that, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." Id., at 45, 96 S.Ct., at 647. While noting that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," id., at 66,

96 S.Ct., at 657, the Buckley Court "acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement ..." id. Thus the Court held that independent reporting requirements may be imposed upon individuals and groups "when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." Id., at 80, 96 S.Ct., at 664.

In the instant case, section 163-278.6(14) defines individuals and groups that seek to "influence or attempt to influence the result of an election" as political committees and subjects them to registering and reporting requirements whether or not they "expressly advocate the election or defeat of a clearly identified candidate." Groups engaging only in issue advocacy are thus subject to spending restrictions and reporting requirements. This violates the First Amendment, as construed by the Supreme Court in Buckley v. Valeo. The Buckley Court noted that, while a statute may target "those expenditures that expressly advocate a particular election result," id., it may not target funds used for general issue advocacy. By this standard, section 163-278.6(14) is fatally overbroad: it does not limit its coverage to entities engaging in express advocacy.

Because section 163-278.6(14) denies full First Amendment protection to individuals and groups engaged in issue advocacy, thereby chilling political speech, it is facially unconstitutional.

B. The prohibitions on independent expenditures and direct contributions in section 163-269 and 163-278.19

[5] Section 163-269 makes it unlawful for any corporation "directly or indirectly, to make any contribution or expenditure ... for any political purpose whatsoever...." Similarly, section 163-278.19 prohibits corporations from "mak[ing] any contribution or expenditure ... for any political

purpose whatsoever."[2] In Austin v. Michigan Chamber of Commerce, 494 U.S., at 657, 110 S.Ct., at 1396, the Supreme Court held that "[t]he mere fact that [an entity] is a corporation does not remove its speech from the ambit of the First Amendment." Of course, corporate involvement in politics poses a risk of corruption, or the appearance of corruption, to the political process through "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Id., at 66, 110 S.Ct., at 1397.

The Supreme Court has noted the need "to restrict the influence of political war chests funneled through the corporate form," Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 501, 105 S.Ct. 1459, 1470, 84 L.Ed.2d 455 (1985) ("NCPAC"), to curb the political influence of "those who exercise control over large aggregations of capital," U.S. v. International Union United Auto. Workers, 352 U.S. 567, 585, 77 S.Ct. 529, 538, 1 L.Ed.2d 563 (1957), and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 206, 103 S.Ct. 552, 559, 74 L.Ed.2d 364 (1982). The "concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of ideas." MCFL, 479 U.S., at 257, 107 S.Ct., at 627. Corporate political activity may thus be regulated to serve the compelling state interest of protecting the integrity of the political process.

[6] In MCFL the Supreme Court found that not-for-profit corporations structured to avoid corrupting the

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[2] "Political purpose" is defined as "any purpose in aid of seeking to influence an election or a political party or candidate." N.C.Gen.Stat. § 163-278.6(16).

political process could be "more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." Id., at 263, 107 S.Ct., at 631. The MCFL Court described the three salient characteristics which demonstrated why the plaintiff corporation should be exempt from corporate expenditure limitations: (1) it was formed for the express purpose of promoting political ideas, (2) it did not have shareholders or other persons which had an economic interest in its assets and earnings, and (3) it was not established by a traditional business corporation or labor union and did not accept contributions from such entities. Id., at 264, 107 S.Ct., at 631. These factors are not dispositive in determining when corporations should be exempt from expenditure limitations, but are instructive in showing that statutes limiting corporate political spending must distinguish between those corporations which threaten the political process and those which do not.

[7] In the case at bar section 163-269 and 163.278.19 prohibit all nonprofit corporations from making independent expenditures, regardless of whether the corporations demonstrate a real or perceived threat to the political process. The statutes make no attempt to distinguish between corporations which pose a threat to the integrity of the political process and those which do not. They merely prohibit all corporations, without regard for their purpose or threat of corruption, from making independent expenditures "for any political purpose whatsoever." This violates the Supreme Court's mandate to "be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Id., at 265, 107 S.Ct., at 631.

Because sections 163-269 and 163-278.19 are drawn too broadly, and might result in burdening innocent entities with expenditure limitations properly designed for traditional for-profit corporate entities, they are facially overbroad and unconstitutional.

C. The prohibition on legislators or candidates soliciting contributions from lobbyists in section 163-278.13B

[8] Section 163-278.13B(b) prohibits "limited contributees" from soliciting or accepting contributions from "limited contributors" while the North Carolina General Assembly is in session. Similarly, during a legislative session a "limited contributor" may not make or offer to make a contribution to a "limited contributee". § 163-278.13B(c). A "limited contributee" is defined as "a member of or candidate for the Council of State, a member or candidate for the General Assembly, or a political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly." § 163-278.13B(a)(2). A "limited contributor" is defined as "a lobbyist, ... that lobbyist's agent, or a political committee that employs or contracts with or whose parent entity employs or contracts with a lobbyist...." § 163-278.13B(a)(1).

As noted above, the Buckley Court held that, while limitations on contributions clearly implicate fundamental First Amendment rights, they "entail[ ] only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S., at 20, 96 S.Ct., at 635. Because contribution limitations usually involve lesser impositions upon First Amendment freedoms than do expenditure limitations, the Supreme Court has held that they generally "require less compelling justification" to pass constitutional muster. MCFL, 479 U.S., at 259-260, 107 S.Ct., at 629.

Unlike the statutes considered in Buckley and MCFL, however, the restrictions at issue here are limitations on when a contribution can be made, regardless of the amount of the contribution. Because this temporal limitation is a complete ban on fundraising while the legislature is in session, it has "a severe impact on political dialogue" by "prevent[ing] candidates from amassing the resources necessary for effective advocacy." Buckley, 424 U.S., at 21, 96 S.Ct., at 636. This limitation on effective advocacy places such a high burden on the free speech and associational rights of the candidates that this Court will apply the "strict scrutiny" standard elucidated by the Supreme Court in Austin and MCFL. The State must therefore demonstrate that this limitation is narrowly tailored to advance a "compelling state interest."

The State argues that the statute aims to prevent corruption or the appearance of corruption. The Supreme Court has recognized that these may be "legitimate and compelling government interests" for restricting campaign finances. Austin, 494 U.S., at 658, 110 S.Ct., at 1397; NCPAC, 470 U.S., at 496- 497, 105 S.Ct., at 1468-1469. Assuming, without deciding, that the State's asserted aims are legitimate and compelling in this case, the statute is not narrowly tailored to advance these interests in the least intrusive way.

The prohibition in section 163-278.13B applies to all candidates for office, both incumbents and non-incumbents. A statute seeking to avoid corruption or the appearance of corruption in the State legislature does not advance those purposes by limiting the fundraising of non-incumbent candidates for office. Additionally, the statute fails to account for the fact that political corruption may occur at anytime, whether or not the legislature is in session. Finally, the ban during legislative sessions is complete; it does not discriminate between large contributions with the potential to corrupt and small contributions with no such corruptive potential.

The limitations contained in section 163-278.13B are not narrowly tailored to address the harms asserted by the State to justify the statute, and cannot survive strict scrutiny. Section 163-278.13B is therefore unconstitutional.

CONCLUSION

For the reasons stated above, the Court hereby GRANTS Plaintiffs' motion for summary judgment as to all claims, and DENIES Defendants' motion for summary judgment and Defendants' motion to certify and abstain. Defendants are hereby permanently enjoined from relying on, enforcing, or prosecuting violations of sections 163-278.6(14), 163-269, 163-278.19, and 163-278.13B against NCRL, Holt, NCRLPAC, and others similarly situated.

SO ORDERED.

§ 163-278.13B. Limitation on fund-raising during legislative session.

(a) Definitions. - For purposes of this section:

(1) 'Limited contributor' means a lobbyist registered pursuant to Article 91A of Chapter 120 of the General Statutes, that lobbyist's agent, or a political committee that employs or contracts with or whose parent entity employs or contracts with a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes.

(2) 'Limited contributee' means a member of or candidate for the Council of State, a member of or a candidate for the General Assembly, or a political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly.

(3) The General Assembly is in 'regular session' from the date set by law or resolution that the General Assembly convenes until the General Assembly either adjourns sine die or recessed or adjourns for more than 10 days.

(4) A contribution is 'made' during regular session if the check or other instrument is dated during the session, or if the check or other instrument is delivered to the limited contributee during session, or if the limited contributor pledges during the session to deliver the check or other instrument at a later time.

(5) A contribution is 'accepted' during regular session if the check or other instrument is dated during the session, or if the limited contributee receives the check or other instrument during session and does not return

it within 10 days, or agrees during the session to receive the check or other instrument at a later time.

(b) Prohibited Solicitations. - While the General Assembly is in regular session, no limited contributee or the real or purported agent of a limited contributee shall:

(1) Solicit a contribution from a limited contributor to be made to that limited contributee or to be made to any other candidate, officeholder, or political committee: or

(2) Solicit a third party, requesting or directing that the third party directly or indirectly relay to the prohibited contributor the prohibited contributee's solicitation of a contribution.

(c) Prohibited Contributions. - While the General Assembly is in regular session:

(1) No limited contributor shall make or offer to make a contribution to a limited contributee.

(2) No limited contributor shall make a contribution to any candidate, officeholder, or political committee, directing or requesting that the contribution be made in turn to a limited contributee.

(3) No limited contributor shall transfer any amount of money or anything of value to any entity, directing or requesting that the entity use what was transferred to contribute to a limited contributee.

(4) No limited contributee shall accept a contribution from a limited contributor.

(c1) Exception. - The provisions of this section do not apply with regard to a limited contributee during the three weeks prior to the day of a second primary if that limited contributee is a candidate who will be on the ballot in that second primary.

(d) Prosecution. - A violation of this section is a Class 2 misdemeanor. (SL 1997-515.)

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT

Section One of the Fourteenth Amendment tot he Constitution of the United States provides in pertinent part: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U.S.
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No. 98-1887

In the

Supreme Court of the United States

October Term, 1998

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; BARBARA HOLT, President of North Carolina Right to Life Incorporated,
Petitioners,

v.

GARY O. BARTLETT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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---

BRIEF IN OPPOSITION

QUESTION PRESENTED

Respondents do not object to petitioners' presentation of the Question Presented.

LISTING OF PARTIES

Petitioners' listing of the parties omits the respondents who are as follows: Gary O. Bartlett, Secretary-Director of the North Carolina State Board of Elections; Steve A. Balog,

District Attorney for N.C. Prosecutorial District 15A; Michael F. Easley, North Carolina Attorney General; June K. Youngblood, Dorothy Presser, Faiger M. Blackwell, members of the State Board of Elections; S. Katherine Burnette, Secretary of the Board of Elections, and Larry Leake, Chairman of the State Board of Elections.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional and statutory provisions involved in this case are the First and Fourteenth Amendments to the Constitution of the United States and N.C. GEN. STAT. § 163-278.13B.

STATEMENT OF THE CASE

Petitioners, North Carolina Right to Life, Inc., ("NCRL"), North Carolina Right to Life Political Action Committee, ("NCRL-PAC"), and Barbara Holt, President of NCRL and lobbyist for NCRL and NCRL-PAC, filed a complaint against defendants, members of the State Board of Elections of the State of North Carolina ("State Board"), the State Attorney General, and the district attorney for the prosecutorial district in which Ms. Holt lives. Petitioners challenged the constitutionality of various provisions of the North Carolina statutes regulating election campaign finance, including N.C. GEN. STAT. § 163-278.13B (App. 1a), which prohibits lobbyists and political committees and their parent entities which employ

lobbyists[1] from contributing to members of or candidates for the General Assembly and the Council of State[2] while the legislature is in regular session.[3]

The district court held the statute unconstitutional on its face. *North Carolina Right to Life, Inc. v. Bartlett*, 3 F. Supp. 2d 675, 681 (1998). The district court reasoned that "[b]ecause this temporal limitation is a complete ban on fundraising while the legislature is in session, it has 'a severe impact on political dialogue' by 'prevent[ing] candidates from amassing the resources necessary for effective advocacy.'" 3 F. Supp. 2d at 681 (citing *Buckley v. Valeo*, 424 U.S. 1, 24 (1976)). Although noting this Court has recognized that preventing corruption or the appearance of corruption "may be 'legitimate and compelling government interests' for restricting campaign finances," citing *Austin v. Michigan Chamber of Commerce*,

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[1] For the sake of brevity, all references hereinafter to "lobbyist" or "lobbyists" shall be understood to include the political committees or parent entities that employ the lobbyist unless the text indicates otherwise. *See* N.C. GEN. STAT. § 163-278.13B(a)(1) (App. 1a).

[2] The Council of State consists of the Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. N.C. Const. art. III §§ 7(1), 8 (App. 5a, 7a)

[3] N.C. GEN. STAT. § 163-278.13B(a)(3). (App. 1a) Essentially, the statute covers the "Long Session" of the General Assembly held in non-election, odd-numbered years and the "Short Session" held in even-numbered, election years. The statute does not cover special sessions of the General Assembly called by the Governor.

494 U.S. 652, 658 (1990), and *Federal Elections Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985), the district court assumed, without deciding, that "the state's asserted aims are legitimate and compelling in this case." 3 F. Supp. 2d at 681. The district court concluded, however, that "the statute is not narrowly tailored to advance the interests in the least intrusive way," because it is applicable to both incumbents and non-incumbents. *Id.* The district court reasoned that the statute failed to take into account that corruption can take place at any time, not just when the legislature is in session, and faulted the statute for not discriminating "between large contributions with the potential to corrupt and small contributions with no such corruptive potential." *Id.*

The Court of Appeals for the Fourth Circuit, in a unanimous decision authored by Chief Judge Wilkinson, reversed the district court's ruling that N.C. GEN. STAT. § 163-278.13B is facially unconstitutional. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714-18 (4th Cir. 1999).[4] First, the Court of Appeals held that the statute did not unconstitutionally burden First Amendment rights of free speech and association. The appeals court recognized that although limits on campaign contributions do implicate those rights, "'[n]either the right to associate nor the right to participate in political activities is absolute.'" *Id.* at 715 (quoting *CSC v. National Ass'n of Letter Carriers*, 413 U.S.

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[4] The Court of Appeals affirmed the district court's determination that other election campaign statutes not at issue here were unconstitutional.

548, 567 (1973)). Then the court, referencing the Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601-1612, as an example, observed that "the activities of lobbyists are extensively regulated." *Id.* The court found that North Carolina's statute put only a "temporary hold on appellees' ability to contribute during the General Assembly session, leaving them free to contribute during the rest of the calendar year and to engage in political speech for the entire year." *Id.*

The Court of Appeals held that the temporal ban on contributions does in fact advance the state's interest in combating corruption and the appearance of corruption, which *Buckley* recognized as a legitimate governmental interest. *Id.* Then the Court rejected the contention that only large contributions can corrupt or have the appearance of corrupting the legislative process. The Court held that "[c]orruption, either petty or massive, is a compelling state interest because it distorts both the concept of popular sovereignty and the theory of representative government." *Id.*

Noting cases of legislative influence peddling from several states, the Fourth Circuit held that "[t]he First Amendment does not prevent states such as North Carolina from recognizing these dangers and taking reasonable steps to ensure that the appearance of corruption does not undermine public confidence in the integrity of representative democracy." *Id.* at 716 (citing *Buckley*, 424 U.S. at 26-27). The court rejected petitioners' argument that North Carolina had not proved that it had experienced a particular problem with legislative graft. The court recognized that "[w]hile lobbyists do much to inform the

legislative process, and their participation is in the main both constructive and honest, there remain powerful hydraulic pressures at play which can cause both legislators and lobbyists to cross the line. State governments need not await the onset of scandal before taking action." *Id.*

The Court then found that the statute was narrowly tailored because it was "limited to lobbyists and the political committees that employ them--the two most ubiquitous and powerful players in the political arena," and "the restrictions are temporally limited . . . cover[ing] only that period during which the risk of an actual quid pro quo or the appearance of one runs highest." *Id.* Rejecting again the contention that small contributions do not have the corrosive effect of large ones, the Court of Appeals, citing *Buckley*, 424 U.S. at 30, noted that it had "'no scalpel to probe such fine distinctions,'" but even if it did, "the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution." *Id.*

Rejecting the contention that contributions to non-incumbent candidates cannot corrupt or have the appearance of corruption, the Court reasoned that "sticks can work as well as carrots, and the threat of contributing to a legislator's challenger can supply as powerful an incentive as contributing to that legislator himself." *Id.* Finally, the Court of Appeals disagreed that the statute favored incumbents over challengers and deprived challengers of a significant source of campaign funding. The court found this contention to be "squarely rejected by the Supreme Court in *Buckley*," where this Court

sustained FECA's $1000 limitation on contributions to all legislative candidates, whether incumbents or challengers. "'[T]he danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents.'" *Id.* at 717 (citing *Buckley*, 424 U.S. at 33). The Court of Appeals believed that "the Court's view [in *Buckley*] was informed by the realization that if challengers and incumbents were required to play by different sets of campaign finance rules, few reforms would be likely to win legislative enactment." *Id.*

The Fourth Circuit proceeded to reject summarily petitioners' argument that lobbyists and the political committees that employ them were denied equal protection of the laws because they are treated differently from members of the general public. *Id.* Finally, the Court of Appeals found no merit in the suggestion that petitioners were "force[d] to forego their constitutional right to petition the government for a redress of grievances if, during the General Assembly session, they wish to exercise their First Amendment right to associate by contributing to candidates and incumbents." *Id.* The court noted that the lobbyists' position is somewhat like that of federal employees, whose right to participate in political campaigns is curtailed under the Hatch Act by virtue of their employment, a curtailment which was reaffirmed by this Court in *CVC v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973). *Id.* The Court of Appeals found the interests furthered by the statute to be compelling and the burden on petitioners' associational rights minimal. *Id.*

REASONS FOR DENYING THE WRIT

The opinion of the Fourth Circuit cogently enunciates why it upheld the constitutionality of N.C. GEN. STAT. § 163-278.13B as a narrowly drawn, temporal restriction on the power of lobbyists to contribute to candidates for the General Assembly and Council of State of North Carolina while the General Assembly is in regular session. The Fourth Circuit fully considered and rejected all the arguments made by petitioners. The Court of Appeals recognized the statute is directed at those persons and their employers who are in a unique position to improperly influence or appear to improperly influence the actions of legislators and statewide elected officials. The sweep of the statute is no broader and lasts no longer than is absolutely necessary to accomplish the obvious purpose of the statute--preventing corruption or the appearance of corruption of the electoral/legislative process.

Protecting elections from corruption and the appearance of corruption has been repeatedly recognized by this Court as a compelling governmental interest which justifies limited restrictions on First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 45 (1976); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981); *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985). The petitioners have shown no conflict in the circuits on the issue of the constitutionality of statutes similar to the one at issue here. They have shown at most only a conflict with the Eighth Circuit on the evidentiary showing a state must make in defending its statutes from constitutional attack. The Petition for Writ of Certiorari

presents no valid reason why the writ should issue. Respondents suggest the only reason why the Court might issue the writ is to affirm the reasoning of the court below.

I. THE FOURTH CIRCUIT CORRECTLY HELD THAT NORTH CAROLINA'S LIMITATION ON CAMPAIGN CONTRIBUTIONS BY LOBBYISTS AND THEIR EMPLOYERS WHILE THE LEGISLATURE IS IN REGULAR SESSION FURTHERS A LEGITIMATE STATE INTEREST.

This Court held in *Buckley* that combating corruption and the appearance of corruption are compelling governmental interests. This Court has similarly held that the government may restrict the participation of certain groups in political campaigns in the furtherance of an overriding governmental interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *CVC v. National Ass'n Letter Carriers*, 413 U.S. 548 (1973). North Carolina's temporal restriction on campaign contributions by lobbyists fits well within the dictates of these decisions, as the Fourth Circuit opinion makes clear. There is nothing inherently corrupting about corporations, federal employees, or lobbyists; yet each group, because of its peculiar characteristics, has the potential to distort the electoral or legislative process to the detriment of representative democracy.

Petitioners argue that because anyone may contribute up to $4,000 per candidate per election in North Carolina, there is no reason to believe that a $4,000 contribution to a candidate from a lobbyist is any more corrosive than the same contribution

from anyone else. (*Pet.* at 7) The argument fails because the lobbyist is not another Jane or Joe Citizen. The lobbyists' proximity to legislators and the legislative process distinguishes them from rank and file citizens. However honest the vast majority of lobbyists undoubtedly are, this promixity, when coupled with potentially great financial resources, has the potential to undermine public confidence in the legislative process if lobbyists are seen to be making contributions while legislation is being enacted. North Carolina's legislators, who have a real interest in maintaining the integrity of the legislative process and who must answer to the voters, have determined that while the legislature is in regular session, no campaign contributions should be solicited or accepted from lobbyists. Legislators themselves are in the best position to judge whether contributions from lobbyists during legislative session may corrupt or create the appearance of corruption. The courts are in no better position to second-guess their legislative judgment.

Petitioners argue that there is no reason to believe that contributions by lobbyists made during the legislative session are any more corrupting than contributions made at any other time. A contribution by a lobbyist made while the Legislature is debating legislation that may directly impact the lobbyist's principal has the appearance of a quid pro quo. Moreover, a corrupt legislator is more likely to be influenced by a contribution made while legislation is pending than by one made before the session in the hope or expectation of beneficial results or one after the session in appreciation of services rendered. Finally, as the Fourth Circuit noted, "the appearance

of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution." 168 F.3d at 716.

It may well be that a complete ban on contributions from lobbyists as the State of Kentucky has enacted (App. 16a) is constitutional, but North Carolina has not undertaken such action. Rather, the General Assembly of North Carolina has merely declined to permit campaign contributions from lobbyists during the regular session. The limited restriction, focused solely on those who are paid to represent special interests and those entities that pay them, serves to defuse the idea that legislators and legislation may be bought or sold.

II. N.C. GEN. STAT. § 163-278.13B DOES NOT CONFLICT WITH THE OPINION OF THE CALIFORNIA SUPREME COURT IN *FAIR POLITICAL PRACTICES COMMISSION v. SUPERIOR COURT OF LOS ANGELES COUNTY.*

In *Fair Political Practices Comm'n v. Superior Court of Los Angeles County*, 599 P.2d 46 (Cal. 1979), *cert. denied*, 444 U.S. 1049 (1980), the California Supreme Court held unconstitutional a statute that barred all contributions by all lobbyists, at all times, to any state candidate, candidate's political committee, or elected state officer. *Id.* at 49. The state Supreme Court held that "it does not appear that total prohibition of all contributions by any lobbyist is a closely drawn restriction," *id.* at 52, and that "[w]hile either apparent or actual political corruption might warrant some restriction of lobbyist association freedom, it does not warrant total

prohibition of all contributions by all lobbyists to all candidates." *Id.* at 53. The court did uphold a monthly gift limitation of $10 from lobbyists "to any state candidate, a legislative agency or elective state official." *Id.* The court observed that while all have the right to "'petition the Government for redress of grievances,'" and "[t]he lobbyist's function obviously is to exercise such right on behalf of his employer," reasonable registration and reporting requirements do not "directly limit or restrict the right to petition." *Id.* The court pointed out that those restrictions "do[] not substantially interfere with the ability of the lobbyist to raise his voice." *Id.* at 54.

North Carolina's temporal limitation on lobbyists' contributions is much more narrow than the total ban imposed by the California statute and therefore avoids the problems which caused that statute to be voided. Like the California statute limiting the value of gifts, which the California Supreme Court approved, the North Carolina statute does not interfere with the ability of a lobbyist to raise his or her voice in the halls of the legislative buildings during regular sessions. The lobbyist is simply prohibited from adding undue emphasis with a check while the legislature is in session.

III. THE FOURTH CIRCUIT DID NOT ERR IN HOLDING THAT N.C. GEN. STAT. § 163-278.13B IS NARROWLY DRAWN TO ACCOMPLISH A LEGITIMATE STATE INTEREST.

A. THE FOURTH CIRCUIT PROPERLY DID NOT ATTEMPT TO DISTINGUISH BETWEEN LARGE AND SMALL CONTRIBUTIONS FROM LOBBYISTS.

The Court of Appeals correctly declined to substitute its judgment for the state legislature's in regard to the level of lobbyists' contributions that would corrupt or appear to corrupt the legislative process. Petitioners' suggestion that *Buckley* stands for the proposition that only the size of the contribution may be limited and not its timing or source is spurious. The $1,000 contribution limit approved in *Buckley* was defined not just by the amount of the contribution but by its source and its timing. Under the Federal Elections Campaign Act of 1971, as upheld in *Buckley*, political campaign contributions had to originate from individuals and not corporations. The $1,000 limitation on gifts per election was part of a total scheme limiting to $25,000 the amount that may be given in any year by an individual. Thus, an individual who has "maxed out" in a calendar year, must wait until the start of a new year before contributing again. This Court found no constitutional infirmity in this temporal limitation. *Buckley*, 424 U.S. at 38.

Furthermore, the decision by the Fourth Circuit upholding N.C. GEN. STAT. § 163-278.13B does not conflict with either *NAACP v. Button*, 371 U.S. 415 (1963) (holding unconstitutional the application of a statute to bar the NAACP from referring persons whose civil rights were violated to a staff attorney), or *In re Primus*, 436 U.S. 412 (1978) (holding unconstitutional state bar disciplinary action against ACLU attorney for advising persons of their legal rights and referring such person to an ACLU-affiliated attorney). North Carolina

has not sanctioned any lobbyist or organization for representing or purporting to represent the interests of anyone.

B. That N.C. Gen. Stat. § 163-278.13B Includes Challengers As Well As Incumbent Candidates Does Not Make The Statute Overbroad.

Petitioners complain that N.C. Gen. Stat. § 163-278.13B is overbroad because it prohibits lobbyists and their employers from contributing to challengers as well as incumbents. Petitioners initially challenged N.C. Gen. Stat. § 163-278.13A (App. 23a), which applied only to incumbents. During the pendency of this litigation, the statute was amended to include challengers, and petitioners amended their complaint to raise this issue as well. Thus, petitioners in actuality contest any restriction on the ability of lobbyists to make political contributions. The Fourth Circuit rejected the state's argument that since none of the petitioners were challengers for office, they had no standing to raise this issue. The Court went on to observe, that "sticks can work as well as carrots, and the threat of contribution to a legislator's challengers can supply as powerful an incentive as contributing to that legislator himself." 168 F.3d at 716.

If any restriction is valid, then it is valid in application to challengers and incumbents, and as such, is completely consistent with *Buckley*. 424 U.S. at 26 ("To the extent that large contributions are given to secure political quid pro quo's from current *and potential* office holders, the integrity of our system of representative democracy is undermined.").

(Emphasis added.) As this Court noted, "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." 424 U.S. at 31. This Court concluded in *Buckley* that contribution limitations should be applied to incumbents and challengers alike. "Since the danger of corruption and the appearance of corruption apply with equal force to challengers and to incumbents, Congress had ample justification for imposing the same fundraising constraints upon both." *Id.* at 33. The Fourth Circuit correctly employed a similar analysis in the instant case.

C. Registration And Reporting Requirements Do Not Substitute For A Ban On Lobbyists' Contributions During Legislative Sessions In Avoiding The Appearance Of Corruption.

Petitioners suggest that because lobbyists must be registered and their contributions reported, the prohibition on contributions during regular legislative sessions is superfluous. The challenged prohibition addresses a concern not covered by registration and reporting requirements. Registration is necessary to identify the paid lobbyists and their clients so legislators know the interests of those paid to influence their votes. Campaign finance reporting requirements are after-the-fact events and may discourage misconduct because amounts contributed will eventually be disclosed and are limited. While a $4,000 contribution may not be corrupting in many circumstances, it can definitely be corrupting or appear to be corrupting if it is given at a crucial point in the legislative

process. The General Assembly has chosen to eliminate at least the appearance of corruption by requiring that lobbyists and their employers make their contributions when the legislature is not meeting. Required deferral of political contributions may in actuality also prevent corruption. Thus, registration and reporting requirements are not a substitute for and do not alone accomplish the purposes of the prohibition on campaign contributions during legislative sessions.

IV. THE FOURTH CIRCUIT DID NOT ERR BY NOT REQUIRING THE STATE TO SHOW THAT N.C. GEN. STAT. § 163-278.13B WAS NARROWLY TAILORED TO FURTHER LEGITIMATE GOVERNMENTAL INTERESTS AND THERE IS NO DISPUTE AMONG THE CIRCUITS REGARDING A TEMPORAL LIMITATION ON THE CONTRIBUTIONS OF LOBBYISTS.

A. The Fourth Circuit's Decision Does Not Conflict With The Decisions Of This Court.

Petitioners assert that decisions of this Court require that the state prove the actual "existence of the evil" feared. (*Pet.* at 14). Neither the majority nor plurality holdings of the cited cases, nor the concurring and dissented opinions cited, support petitioners' argument.

Although North Carolina, fortunately, could not cite historical examples of legislative corruption within its boundaries, it could cite cases from other jurisdictions. The Court of Appeals found this to be ample support for the reasonableness of the statute. 168 F.3d at 716. This Court has

found that the appearance of corruption from large political contributions was "[o]f almost equal concern as the danger of actual quid pro quo arrangements." *Buckley*, 424 U.S. at 27.[5] Because *Buckley* and subsequent decisions of this Court recognize that avoiding the actuality or appearance of corruption is a compelling governmental interest and that limitations on contributions "require less compelling justification" than limitation on expenditures, *Federal Elections Comm'n v. Mass. Right to Life*, 479 U.S. 238, 259-60 (1986), the only issue is whether the statute is sufficiently narrowly tailored to accomplish that end. In the absence of a showing that the temporal limitation amounts to a "difference[] in kind," *Buckley*, 424 U.S. at 30, the statute does not fail. This Court said in *Buckley* that "[i]t is unnecessary to look beyond the Act's primary purpose--to limit the actuality and appearance of corruption resulting from large individual financial contributions--in order to find a constitutionally sufficient justification for the $1,000 contribution limitation."

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[5] Although they fault the Court of Appeals' upholding the statute without requiring actual proof of corruption or the appearance of corruption in North Carolina, petitioners are not concerned that the district court found, without any support in the record, that because the ban on lobbyists and their employer political committees was complete during regular legislative sessions, it has "'a severe impact on political dialogue'" by "'prevent[ing] candidates from amassing the resources necessary for effective advocacy.'" 3 F. Supp. 2d at 68 (citing *Buckley*, 424 U.S. at 21.) This "finding" is counter-intuitiveat best since the ban is only on lobbyists and their political committees during regular sessions of the legislature. The greatest impact of the ban is in non-election years when the General Assembly holds its "Long Sessions."

Id. at 26. The Court did take notice of "the deeply disturbing examples surfacing after the 1972 election" as evidence that "the problem is not an illusory one." *Id.* at 27.

N.C. GEN. STAT. § 163-278.13B deals not with the problem of large political contributions, but with the appearance, if not indeed the actuality, of contributions by lobbyists while legislators are in the process of enacting or defeating legislation affecting the lobbyists' principals. Because of the unique proximity of lobbyists to the legislative process and the potential for undue influence that this proximity affords, the General Assembly has logically determined that to maintain the confidence of the public and to avoid the appearance of evil, legislators and members of the Council of State and candidates for these positions should not solicit or accept campaign contributions from lobbyists or the organizations that employ them while the legislature is in regular session. No one is in a better position than the legislators themselves to decide what conduct by legislators and those around them might be or appear to be corrupting. *See Federal Elections Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982); *see also Turner Broadcasting System v. FCC*, 512 U.S. 622 (1996) (deferring to Congressional findings). The judgment of the legislators, then, in enacting this narrowly drawn prophylactic measure, is to be commended, not condemned.

Petitioners' characterization of this temporal limitation on their ability to make campaign contributions as a major incursion on the rights of free speech and association is a gross

distortion of reality. These rights are barely affected when lobbyists and their principals remain free to contribute up to $4,000 per primary or election to any candidate just as soon as the legislature adjourns.

Petitioners cite *Shrink Missouri Gov't PAC v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996), in which a total ban on political contributions from any source during legislative sessions was held unconstitutional. The district judge discounted not only the opinions of experienced Missouri state legislators that accepting contributions during legislative sessions has the appearance of evil but also examples of legislative corruption in Louisiana. The district court opined in effect that Missouri could validate the ban only on the shortcomings of its own legislators. 922 F. Supp. at 1422. If the holding of the case is correct, it would appear that proof short of a convicted state legislator or a legislator's confession of venality would be inadequate. The district court's view of proof required in the campaign finance context has not been adopted by this Court.

B. PETITIONERS HAVE SHOWN NO CIRCUIT COURT OPINION WHICH CONFLICTS WITH THE OPINION OF THE FOURTH CIRCUIT IN THE INSTANT CASE.

Petitioners claim that cases from other circuits conflict with the decision of the Fourth Circuit in the instant case. None of the cases they cite deal with a temporal restriction on campaign contributions by lobbyists or their principals. None of the cases they cite hold that an *evidentiary* record is required to justify legislation when the justification is apparent. And

none of their cases is apposite in any other manner to the issue presented in the instant case.

In *National Advertising Co v. Town of Babylon*, 900 F. 2d 551 (2d Cir.), *cert. denied*, 498 U.S. 852 (1990), the Second Circuit struck down an ordinance restraining commercial speech because the record contained neither a "statement of a substantial governmental interest" nor extrinsic evidence of any governmental interest. *Id.* at 555. The court recognized that courts did take "judicial notice of a common-sense linkage between a stated governmental interest and a restriction in order to assess . . . that a restriction directly advance[s] the governmental interest asserted." *Id.* at 556.

In *Association of Community Org. Now v. City of Frontenac*, 714 F.2d 813, 818 (8th Cir. 1983), the Eighth Circuit recognized that a municipality has a legitimate governmental interest in preserving the privacy and safety of its citizens. It nevertheless held unconstitutional an ordinance forbidding door-to-door solicitation after 6:00 p.m. as not narrowly tailored to accomplish a legitimate governmental objective--to reduce crime and to prevent unwanted annoyances to residents--where there were several less restrictive alternatives available.

The Ninth Circuit declared unconstitutional a prohibition against out-of-district political contributions on the ground that the prohibition was both under-inclusive and over-inclusive to advance the state's interest in preventing corruption. *Vannatta v. Keisling*, 151 F. 3d 1215, 1221 (9th Cir. 1998), *cert. denied*,

119 S. Ct. 870, 142 L. Ed. 2d 771 (1999). In so holding, the court first rejected the articulated state interest in a republican form of government, noting that had "never before been recognized as a sufficiently important state interest." *Id.* at 1217. The Tenth Circuit in *Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987), invalidated a criminal statute prohibiting the distribution of handbills which did not identify the person or organization responsible for the handbill. The court reviewed the articulated government interests without discussion of any evidentiary showing. *Id.* at 948-50.

In *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), the Eighth Circuit held unconstitutional a voter-approved measure that set the lowest limits on campaign contributions in the country. The court said that "[t]he state made no showing as to why it was necessary to adopt the lowest contribution limits in the nation and restrict the First Amendment rights of so many contributors in order to prevent corruption or the appearance of corruption with large contributions." *Id.* at 644. The radically low campaign contribution ceiling constituted, in the court's opinion, a difference not merely in degree but in kind. 72 F.3d at 633. The legislation invalidated in each of these cases is unlike the temporal limitation on the contributions by lobbyists where the connection between the legislation and its purpose is readily apparent.

As correctly noted by petitioners, this Court has granted certiorari in *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999), where

the district court did require "some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* at 520. The court again was concerned with substantial reduction in campaign contribution ceilings by the legislature. The court found that the newly reduced ceilings set by the legislature were "overly restrictive as a matter of law." The dissent objected to the majority opinion for, among other things, failing to render due deference to state legislative findings. *Id.* at 526 (citing *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994)). The dissent also noted that the majority had not followed the approach taken by this Court in *Buckley* where, without reliance on specific Congressional findings, this Court held that Congress could reasonably have concluded that large contributions gave rise to the appearance of corruption. *Id.* If this Court wishes to enunciate a standard different from that used in *Buckley*, the *Shrink Missouri* case presents an opportunity to do so. The Fourth Circuit, however, was applying the clear precedents of this Court in the instant case. Absent an intent to enunciate a new standard, the use by the Fourth Circuit of common sense analysis informed by widely reported legislative behavior from other states is no basis for striking a limited North Carolina restriction imposed by legislators on themselves and other legislative candidates. Moreover, these cases do not support petitioners' argument that an evidentiary showing of actual corruption in North Carolina was necessary before the legislature could adopt legislation to further this interest.

V. COMPLIANCE WITH N.C. GEN. STAT. § 163-278.13B DOES NOT UNCONSTITUTIONALLY COMPEL LOBBYISTS TO RELINQUISH A CONSTITUTIONAL RIGHT.

As the Fourth Circuit noted, this Court has sustained substantial restrictions on the speech and associational rights of federal employees by reason of their employment. *Letter Carriers*, 413 U.S. at 548, re-affirming *Public Workers v. Mitchell*, 330 U.S. 75 (1947) (upholding the constitutionality of § 9(a) of the Hatch Act). The temporal limitation imposed by N.C. GEN. STAT. § 163-278.13B on the ability of lobbyists and their employers to make political donations is considerably less than the restriction that the Hatch Act imposes on the political activities of federal employees. The provisions of the Hatch Act were upheld by this Court not simply because they served to protect federal workers from the machinations of politicians, but also, and perhaps more importantly, because the Act furthered two other substantial governmental interests: the "efficiency of public service," *United States v. National Treasury Employees*, 513 U.S. 454, 492 (1995) (Rehnquist, C.J., dissenting), and the "'great end of Government--the impartial execution of the laws.'" *Id.* at 493 (Rehnquist, C.J., dissenting) (quoting *Public Workers*, 413 U.S. at 565). N.C. GEN. STAT. § 163-278.13B also fosters these interests. Lobbyists are protected from the venal legislator, whose attention is gained only by a contribution paid. The public's interest in the fairness of the legislative process is served by assuring that while the legislature is in session, the legislator's vote will not appear to be for sale to the highest bidder.

Petitioners grossly overstate the restriction on their First Amendment rights. The power of lobbyists and their employers to make political contributions is merely deferred while the legislature is in regular session. While the legislature is in session, lobbyists retain undiminished freedom to engage in actual speech and association as opposed to symbolic speech represented by a campaign contribution. This Court held in *Buckley* that pecuniary limits on contributions constitute "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 29. This is equally true of temporal limitations. Because N.C. GEN. STAT. § 163-278.13B is completely consistent with the teachings of *Buckley* and its progeny, to sustain petitioners' argument would be to undermine *Buckley*'s holding with respect to campaign contribution limits. If a legislature may validly impose a ceiling on the amount of campaign contributions, it may also validly limit when contributions may be made. Petitioners are, therefore, not confronted with an unlawful Hobson's choice of complying with the statute and yielding a Constitutional right.

VI. N.C. GEN. STAT. § 163-278.13B DOES NOT DENY PETITIONERS EQUAL PROTECTION OF THE LAWS.

Petitioners Holt and NCRL-PAC assert that they are denied equal protection of the laws because non-lobbyists and political committees that do not employ lobbyists are not subject to the temporal restrictions on their political contributions. Petitioners argue that lobbyists are in no better position to influence legislators through their contributions than are other members of the general public. Petitioners argue that

legislators are no more likely to sell their votes to lobbyists than to others. This argument ignores the very reason why groups such as NCRL-PAC employ lobbyists -- for their greater expertise and ability to persuade legislators to vote a certain way. Under N.C. GEN. STAT. § 120-47.1(6) a "lobbyist" is an individual who:

> (a) is employed and receives compensation or who contracts for economic consideration, for the purpose of lobbying; or
>
> (b) represents another person and receives compensation for the purpose of lobbying.

The legislature has determined that this greater expertise at negotiating the legislative process should not be augmented with payments to legislative campaigns while legislation is under consideration because, at the very least, it creates the appearance of impropriety. The General Assembly has carefully distinguished between the average citizen and that citizen who purports to have sufficient legislative expertise to be compensated for his legislative efforts. This is a classification grounded in the experience of legislators with professional lobbyists. The classification, *i.e.*, lobbyists and the employer political committees, does not deny equal protection of the laws if the classification is sufficiently related to a legitimate government interest, *i.e.*, the avoidance of corruption or the appearance of corruption of the electoral/legislative process, and narrowly tailored to accomplish that end. N.C. GEN. STAT. § 163-278.13B meets these criteria.

VII. THE PRINCIPLES GOVERNING THIS CASE WERE CLEARLY ESTABLISHED IN *BUCKLEY* AND OTHER DECISIONS OF THIS COURT AND CORRECTLY APPLIED BY THE FOURTH CIRCUIT COURT OF APPEALS; CONSEQUENTLY, THIS COURT SHOULD NOT ISSUE ITS WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE FOURTH CIRCUIT IN THIS CASE.

North Carolina, like twenty of her sister states, imposes temporal restrictions on campaign contributions by various groups to candidates for the legislature or statewide office. (App. 9a). Although the timing restrictions may vary somewhat, generally the restrictions are for the duration of the legislative session. Typically, legislators and candidates for the legislature are precluded from accepting or soliciting contributions from designated groups during the restricted time period. Lobbyists and political committees may not make political contributions while the legislature is in session or legislation is awaiting gubernatorial action. The fact that at least twenty-one states have enacted statutes imposing time restrictions on campaign contributions demonstrates the widespread belief among legislators from all areas of the country that the avoidance of the actuality or appearance of corruption of the electoral/legislative process demands at least a limited cessation of campaign fundraising while the legislature is in session. If petitioners' argument is accepted, statutes of the twenty-one states may be in constitutional jeopardy. Moreover, the principles undergirding this Court's

approval of limitations on the amount of contributions will be undermined.

CONCLUSION

For these reasons, this Court should not issue its writ of certiorari to review the decision of the Fourth Circuit Court of Appeals upholding North Carolina's limited prohibition on campaign contributions during regular legislative sessions by lobbyists and the political committees that employee them.

Respectfully submitted,

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July 7, 1999

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APPENDIX

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WEST'S NORTH CAROLINA STATUTES
CHAPTER 163. ELECTIONS AND ELECTION LAWS
SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS
ARTICLE 22A. REGULATING CONTRIBUTIONS AND EXPENDITURES IN POLITICAL CAMPAIGNS
PART 1. IN GENERAL

§ 163-278.13B. Limitation on fund-raising during legislative session

(a) Definitions.--For purposes of this section:

(1) "Limited contributor" means a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes, that lobbyist's agent, or a political committee that employs or contracts with or whose parent entity employs or contracts with a lobbyist registered pursuant to Article 9A of Chapter 120 of the General Statutes.
(2) "Limited contributee" means a member of or candidate for the Council of State, a member of or candidate for the General Assembly, or a political committee the purpose of which is to assist a member or members of or candidate or candidates for the Council of State or General Assembly.
(3) The General Assembly is in "regular session" from the date set by law or resolution that the General Assembly convenes until the General Assembly either adjourns sine die or recesses

N.C.G.S. § 163-278.13B (1997), continued. . .

or adjourns for more than 10 days.
(4) A contribution is "made" during regular session if the check or other instrument is dated during the session, or if the check or other instrument is delivered to the limited contributee during session, or if the limited contributor pledges during the session to deliver the check or other instrument at a later time.
(5) A contribution is "accepted" during regular session if the check or other instrument is dated during the session, or if the limited contributee receives the check or other instrument during session and does not return it within 10 days, or agrees during session to receive the check or other instrument at a later time.

(b) Prohibited Solicitations.--While the General Assembly is in regular session, no limited contributee or the real or purported agent of a limited contributee shall:

(1) Solicit a contribution from a limited contributor to be made to that limited contributee or to be made to any other candidate, officeholder, or political committee; or

(2) Solicit a third party, requesting or directing that the third party directly or indirectly relay to the prohibited contributor the prohibited contributee's solicitation of a contribution.

(c) Prohibited Contributions.--While the General Assembly is in regular session:

(1) No limited contributor shall make or offer to make a

N.C.G.S. § 163-278.13B (1997), continued. . .

contribution to a limited contributee.
(2) No limited contributor shall make a contribution to any candidate, officeholder, or political committee, directing or requesting that the contribution be made in turn to a limited contributee.
(3) No limited contributor shall transfer any amount of money or anything of value to any entity, directing or requesting that the entity use what was transferred to contribute to a limited contributee.
(4) No limited contributee shall accept a contribution from a limited contributor.

(c1) Exception.--The provisions of this section do not apply with regard to a limited contributee during the three weeks prior to the day of a second primary if that limited contributee is a candidate who will be on the ballot in that second primary.

(d) Prosecution.--A violation of this section is a Class 2 misdemeanor.

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N.C. Const. art. III, § 7(1)

Sec. 7. Other elective officers.

Statute text

(1) Officers. A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

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N.C. Const. art. III, § 8

Sec. 8. Council of State.

Statute text

The Council of State shall consist of the officers whose offices are established by this Article.

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Table of Restrictions on Lobbyists' Political Contributions

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Alabama ALA. CODE § 17-22A	Candidates for state office and their principal campaign committees may not solicit or accept contributions while the legislature is in session (except when the session is within 120 days of a primary, primary runoff or general election or a special election called by the Governor).
Alaska ALASKA STAT. § 24.45.121	Registered lobbyists may not serve on finance or fundraising committees for campaigns' host fundraising events or actively engage in fundraising activities of legislative campaigns.
Alaska ALASKA STAT. § 15.13.074 (c)(1)-(2)	Groups may not contribute before January 1 of the year of a general election, or to a legislator or a candidate for the legislature while the legislature is in a regular or special session, unless the solicitation occurs within 90 days of the election and outside of the capitol city.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Alaska ALASKA STAT. §§ 24.45.121 (9) & 24.60.031	Legislators and legislative employees may not solicit or accept contributions, promises, or pledges to make contributions, or accept money from events held outside of an election year or during a legislative session if substantial purpose of the event is to raise money for campaign or political purposes, unless the solicitation occurs within 90 days of the election and outside of the capitol city.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Arizona ARIZ. REV. STAT. § 41-1234.01	Registered lobbyists may not contribute to legislators during regular sessions of the Legislature or to the Governor during and after regular sessions of the Legislature while legislation is awaiting approval or veto. Registered PACs controlled by a registered principal or a public body are subject to the same limitations as registered lobbyists. Legislators may not accept contributions during regular sessions of the Legislature, and the Governor may not accept contributions during and after regular sessions of the Legislature while legislation is awaiting approval or veto.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Arkansas ARK. CODE ANN. § 7-6-203	Lobbyists, PACs, and lobbyists' principals may not contribute to members of the Council of State and the General Assembly during the period beginning 30 days before and ending 30 days after any session of the General Assembly. Members of the Council of State and the General Assembly during the period beginning 30 days before and ending 30 days after any session of the General Assembly may not accept campaign contributions. During this period it is also unlawful for any person to promise a contribution to the elected official.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Colorado COLO. REV. STAT. ANN. §1-45-104(13)(a)(I)-(II)	No professional lobbyist, volunteer lobbyist, or principal of a professional lobbyist or volunteer lobbyist may contribute or promise to contribute to, or solicit or promise to solicit a contribution for candidates or members of the General Assembly or the Council of State. Lobbyists' principals may not contribute during a regular session of the General Assembly. Principals may not contribute to the Governor or a candidate for Governor during a regular session of the General Assembly or when any measure adopted by the General Assembly is pending before the Governor for approval or disapproval. Legislators may not accept contributions from lobbyists or their principals during the regular session of the General Assembly. The Governor cannot accept contributions from lobbyists or their principals during a regular session of the General Assembly or when any measure adopted by the General Assembly is pending before the Governor for approval or disapproval.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Connecticut CONN. GEN. STAT. ANN. § 9-333*l*(e)	Registered lobbyists may not solicit or make political contributions during certain legislative sessions to any member of the General Assembly. Legislators may not accept contributions from lobbyists or PACs established by or on behalf of a lobbyist during certain legislative sessions.
Georgia GA. CODE ANN. § 21-5-35	Members of the General Assembly, public officers elected statewide, and campaign committees may not accept contributions during any legislative session.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Iowa IOWA CODE § 56.15A	Lobbyists and PACs may not contribute to the campaign of an elected state official, member of the Legislature, or candidate for state office during a regular session of the Legislature and, in the case of the Governor or gubernatorial candidate, for a period of 30 days following the adjournment of a regular legislative session. Legislators may not accept or solicit campaign contributions during a regular session of the Legislature and, in the case of the Governor or gubernatorial candidate, for a period of 30 days following the adjournment of a regular legislative session.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Kansas KAN. STAT. ANN. § 25-4153a	Registered lobbyists and PACs may not contribute to a legislator, legislative candidate, or candidate committee between January 1 and May 15 of each year or at any other time the legislature is in session. Legislators, legislative candidates, and candidate committees may not accept contributions between January 1 and May 15 of each year or at any other time the legislature is in session.
Kentucky KY. REV. STAT. ANN. § 6.811(4)	Lobbyists may not make political contributions.
Kentucky KY. REV. STAT. ANN. § 121A.030 (5)	Candidates for Governor and Lt. Governor may not accept contributions during the 28 days immediately preceding a primary or regular election or 14 days before a runoff primary, or after runoff primary elections.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Louisiana LA. REV. STAT. ANN. § 24:56A	Lobbyists may not contribute funds resulting from fundraising functions held during a legislative session, unless notice of the function is given at least 30 days in advance. Legislators may not accept contributions from lobbyists and lobbyists' principals resulting from fundraising functions while the Legislature is in session, unless proper notice of the function is given.
Minnesota MINN. STAT. § 211A.14	Constitutional office candidates, legislative candidates, and principal campaign committees may not solicit or accept, during a regular or special session, a contribution from a registered lobbyist, a political committee, or a political fund.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Nevada NEV. REV. STAT. §§ 294A.300 & 294A.310	Candidates and legislators may not solicit or accept any monetary contribution during a period of 30 days before a regular session of the legislature and ending 30 days after the final adjournment of a regular session of the Legislature; or the day after the Governor issues a proclamation calling for a special session of the Legislature and ending 15 days after the final adjournment of the special session.
New Mexico N. M. STAT. ANN. § 1-19-34.1(A)-(B)	Individuals, PACs, and lobbyists' principals may not be solicited by legislators, candidates for the state legislature, and Governor beginning January 1 and ending upon the adjournment of the session or, in the case of the Governor, 20 days after the adjournment. Candidates may not solicit contributions beginning January 1 and ending upon the adjournment of the session or, in the case of the Governor, 20 days after the adjournment.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
North Carolina N.C. GEN. STAT. § 163-278.13B	Lobbyists, PACs and lobbyists' principals may not contribute while the General Assembly is in regular session to candidates for legislature or Council of State. Candidates, legislators, and members of the Council of State may not solicit or accept contributions while the General Assembly is in regular session.
Oregon OR. REV. STAT. § 260.174 (1-6)	Individuals, PACs and lobbyists' principals may not contribute to legislators and candidates for the state legislature and Governor beginning January 1 before a regular biennial session of the Legislative Assembly and ending upon the adjournment of the session or, in the case of the Governor, 30 days after the adjournment. Candidates may not solicit or accept contributions beginning January 1 before a regular biennial session of the Legislative Assembly and ending upon the adjournment of the session or, in the case of the Governor, 30 days after the adjournment.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Tennessee TENN. CODE ANN. § 2-10-310	Individuals and PACs may not contribute to legislators or the Governor from the convening of the General Assembly's regular annual session to the earlier of May 15 or the conclusion of the annual session. Candidates and legislators may not solicit or accept contributions from lobbyists or lobbyists' principals while the General Assembly is in session.
Tennessee TENN. CODE ANN. § 3-6-108(i)	Lobbyists may not contribute to members of the General Assembly or to the Governor during the regular annual session of the General Assembly.
Texas TEX. ELECTION CODE ANN. § 253.034	Individuals, including lobbyists and lobbyists' principals, and PACs may not contribute to statewide officeholders or a legislator beginning 30 days before the convening of a regular legislative session and continuing through final adjournment. Legislators may not solicit or accept campaign contributions beginning 30 days before the convening of a regular legislative session and continuing through final adjournment.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Vermont VT. STAT. ANN. Title 2 § 266(3)	Lobbyists and their employers may not contribute or promise to contribute to a member or a member's campaign committee while the General Assembly is in session. General Assembly members and their campaign committees may not accept contributions while the General Assembly is in session.
Washington WASH. REV. CODE § 42.17.710	Contributions may not be solicited or accepted by statewide elected officials or state legislators during the period 30 days before through 30 days after the regular session of the Legislature. Contributions are prohibited during any special legislative session.

Table of Restrictions on Lobbyists' Political Contributions, continued. . .

STATE AND STATUTE	POLITICAL CONTRIBUTION RESTRICTIONS (EFFECTIVE JUNE 1999)
Wisconsin WIS. STAT. § 13.625	Licensed lobbyists may make contributions to elective state officials and candidates for elective office only during the year of the candidate's election, between June 1 and the date of the general election and only if the Legislature is not in session on the date of the contribution. Lobbyists' principals are subject to regulations governing individuals or corporations depending on their status. Candidates and legislators may accept contributions from licensed lobbyists and lobbyists's principals only during the year of the candidate's election, between June 1 and the date of the general election and only if the Legislature is not in session on the date of the contribution.

N.C.G.S. § 163-278.13A(1995) (Repealed by Laws 1997, c. 515, 9(a), eff. Jan. 1, 1998.)

CHAPTER 163. ELECTIONS AND ELECTION LAWS
SUBCHAPTER VIII. REGULATION OF ELECTION CAMPAIGNS
ARTICLE 22A. REGULATING CONTRIBUTIONS AND EXPENDITURES IN POLITICAL CAMPAIGNS
PART 1. IN GENERAL

§ 163-278.13A. No fund-raising from lobbyists for legislators or Council of State members while General Assembly is in regular session.

(a) While the General Assembly is in regular session, none of the following entities may solicit or accept a contribution from, or at the behest or recommendation of, an individual registered as a lobbyist pursuant to Article 9A of Chapter 120 of the General Statutes:

(1) A member of the Council of State; or

(2) A member of the General Assembly; or

(3) A political committee the principal purpose of which is to assist a member or members of the Council of State or General Assembly.

(b) While the General Assembly is in regular session, no individual registered as a lobbyist under Article 9A of Chapter 120 of the General Statutes may make a contribution to any of the entities listed in subdivisions (1) through (3) of subsection (a) of this section.

N.C.G.S. § 163-278.13A(1995) (Repealed by Laws 1997, c. 515, 9(a), eff. Jan. 1, 1998.), continued. . .

(c) This section does not apply to:

(1) Any contribution made to or by a State, county or congressional district executive committee of a political party; or

(2) Any contribution made to or solicited for a political committee that operates on a Statewide basis in conjunction with the executive committee of a political party for the purpose of assisting that party's candidates for Council of State or General Assembly; or

(3) Any contribution made by a member of the Council of State or General Assembly to a political committee the principal purpose of which is to assist himself; or

(4) Any contribution made to or any solicitation for a nonprofit organization under 26 U.S.C. § 501(c); or

(5) Any contribution accepted with the intent that it be used to defray legal or other expenses incurred in connection with the contesting of election results; or

(6) Any contribution to any of the entities listed in subdivisions (1) through (3) of subsection (a) of this section if the member of the Council of State or General Assembly has filed an official notice of

N.C.G.S. § 163-278.13A(1995) (Repealed by Laws 1997, c. 515, 9(a), eff. Jan. 1, 1998.), continued. . .

candidacy with the appropriate board of elections for any elective office, provided the contribution is for the elective office for which the member has filed

(d) A violation of this section is a class 2 misdemeanor, but no individual or person shall be prosecuted under this section for accepting or making a contribution unless the State Board of Elections has notified the individual or person of the apparent violation in writing by certified mail, has given the individual or person an opportunity to return or to request the return of the contribution, and, within 10 days of the receipt of the notification, the individual or person has failed to return or to request the return of the contribution.

(e) For the purposes of this section, the General Assembly is in regular session from the date set by law or resolution that the General Assembly convenes until the General Assembly either:

(1) Adjourns sine die; or

(2) Recesses or adjourns for more than 10 days.

(1991, c. 740, s. 2; 1993, c. 539, s. 1114; 1994, Ex. Sess., c. 24, s. 14(c).)

No. 98-1887

Supreme Court, U.S.
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In The

Supreme Court of the United States

NORTH CAROLINA RIGHT TO LIFE, INCORPORATED; NORTH CAROLINA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; BARBARA HOLT, President of North Carolina Right to Life, Incorporated,

Petitioners,

v.

GARY O. BARTLETT, in his official capacity as Executive Secretary-Director of the State Board of Elections of the State of North Carolina; STEVE A. BALOG, in his official capacity as District Attorney for North Carolina Prosecutorial District 15A, and as a representative of the class of District Attorneys in the State of North Carolina; MIKE EASLEY, in his official capacity as Attorney General for the state of North Carolina; JUNE K. YOUNGBLOOD, in her official capacity as a Member of the State Board of Elections; DOROTHY PRESSER, in her official capacity as a Member of the State Board of Elections; LARRY LEAKE, in his official capacity as Chairman of the State Board of Elections; S. KATHERINE BURNETTE, in her official capacity as Secretary of the State Board of Elections; FAIGER M. BLACKWELL, in his official capacity as a Member of the State Board of Elections,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. North Carolina's Brief In Opposition Confirms That Prohibiting Contributions Based Upon Source Is A Widespread Problem That Requires Addressing By This Court.

North Carolina's Brief In Opposition provides evidence of twenty other states that have banned contributions based upon an individual's profession as a lobbyist. North Carolina claims that this fact "demonstrates the widespread belief" that the avoidance of actual or apparent corruption "demands" a ban on lobbyists' contributions. Brief of Respondents at 26.

To the contrary, the fact that twenty-one states have banned lobbyist contributions in some form shows only the widespread regulation of contributions based upon source. Lobbyists are not the first profession to be prohibited from contributing to candidates and will certainly not be the last.[1] Without guidance from this Court as to the proper analysis, the upholding of lobbyist contribution bans will create a domino effect, with the result that large numbers of professions, and individuals within those professions, will be prohibited from exercising their

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[1] Efforts have been made to ban contributions from individuals within the gambling and casino industry, *Brown v. State*, 680 So.2d 1179 (La. 1996); *Soto v. State*, 565 A.2d 1088 (N.J.Super.Ct.App.Div. 1989), *cert. denied*, 496 U.S. 937 (1990); the securities profession, *Blount v. Securities and Exchange Commission*, 61 F.3d 938 (D.C. Cir.), *cert. denied*, 517 U.S. 1119 (1995); the insurance profession, *Gwinn v. State Ethics Commission*, 426 S.E.2d 890 (Ga. 1993); the liquor industry, *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976); and the police, *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543 (8th Cir.), *cert. denied*, 479 U.S. 1065 (1984).

First Amendment rights merely because they have a certain job.

Furthermore, just because such prohibitions are "widespread" does not make them reasonable. The reasonableness of the belief must be examined.[2] Restrictions on speech cannot be based upon misperceptions, no matter how widely held.[3] However, North Carolina admits that it cannot justify the prohibition with examples of corruption within its own boundaries, *id.* at 16, and offers no other evidential support.

Moreover, the State's argument that if North Carolina's statute is found infirm, the "statutes of [ ] twenty-one states may be in constitutional jeopardy," is easily dismissed. Brief of Respondents at 26. This Court has not shied away from declaring a statute unconstitutional because of the potential effects of its decision on other state laws. For instance, the result of this Court's decision in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), striking down a congressional term limits law, was to invalidate laws adopted in twenty-one other states. *See* Cleta Mitchell, *Setting Limits* at 94 (1996).

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[2] Men used to fear "witches and burnt women" but that does not mean that their fear was reasonable. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[3] Without evidentiary support, there is "no way to challenge the 'appearance of corruption' – others' subjective perception that corruption does exist – other than to make the case that their perceptions are wrong." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996).

II. The Relatedness Of This Case To *Nixon v. Shrink Missouri Government PAC* Makes It A Natural Companion, Yet Its Differences Also Require This Court To Review It.

This case raises several of the same issues as *Nixon v. Shrink Missouri Government PAC*, 161 F.3d 519 (8th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999): namely, what standard of scrutiny the State must satisfy, and the evidence required before First Amendment rights may be restrained. Yet, this case is importantly different from *ShrinkPAC* in that it is a prohibited source case, rather than a contribution limits case. Not only is the overall analysis different, *see* Petition for Writ of Certiorari at 5-8, but it raises important issues in the tradition of previous prohibited source cases. *See Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1995) (whether law could limit independent expenditures by political action committees); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (whether business corporations could be prohibited from using corporate treasury funds for independent expenditures); *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (whether independent expenditures by business corporations could be prohibited); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (whether corporations could be prohibited from making corporate expenditures regarding state referendums); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (whether federal employees could be prohibited from certain political activities).

III. The Court Of Appeals Erred In Holding That North Carolina's Prohibition On Campaign Contributions By Lobbyists And Their Employers While The Legislature Is In Session Furthers A Compelling State Interest.

(A). The State admits that there is nothing inherently corrupting about lobbyists.

North Carolina admits that there is nothing inherently corrupting about lobbyists. Brief of Respondents at 9. Thus, the State has admitted that lobbyists are *not* like certain sources identified by this Court as posing such an inherent risk of corrupting the political process that they could be totally barred from political participation. *See Austin*, 494 U.S. 652 (upholding prohibition on business corporations from using corporate treasury funds for independent expenditures); *National Ass'n of Letter Carriers*, 413 U.S. 548 (upholding Hatch Act provision which prohibits federal employees from certain political activities); *cf. National Conservative Political Action Comm.*, 470 U.S. 480 (striking down federal law limiting independent expenditures by political action committees); *Massachusetts Citizens for Life*, 479 U.S. 238 (holding that prohibition on independent expenditures by business corporations could not constitutionally be applied to not-for-profit ideological membership corporations); *Bellotti*, 435 U.S. 765 (striking down a prohibition on corporate expenditures regarding state referendums).

As previously explained, *see* Petition for Writ of Certiorari at 5-8, prohibited source analysis focuses on whether a particular group's participation in the political process is inherently corrupting. The State agrees that participation by lobbyists is not inherently corrupting,

and the Fourth Circuit made no finding that North Carolina lobbyists had an inherent and unique ability to corrupt legislators. Therefore, the Fourth Circuit erred in determining that lobbyists may be regulated as a prohibited source and thus unconstitutionally denied lobbyists the right to make contributions to candidates during the legislative session. *See Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1935 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.") (*comparing Carey v. Brown*, 447 U.S. 455, 465 (1980); *Bellotti*, 435 U.S. at 777, 784-85)).

(B). North Carolina prohibits lobbyists' contributions based only upon the proximity to legislators and lobbyists' "potentially great financial resources."

North Carolina argues that its ban on lobbyists' contributions is justified because of their "proximity to legislators and the legislative process." Brief of Respondents at 10. According to the Respondents, this proximity, "when coupled with potentially great financial resources, has the potential to undermine public confidence in the legislative process." *Id.*

That lobbyists may have "great financial resources" is irrelevant. North Carolina's individual contribution limit of $4,000 applies equally to everyone regardless of their supposed wealth. Therefore, individual lobbyists cannot use "potentially great financial resources" to make unlimited contributions.

(C). North Carolina now claims that contributions by lobbyists may be prohibited because they "create[ ] the appearance of impropriety."

North Carolina now suggests that it may restrict the contribution rights of lobbyists because "at the very least, it creates the appearance of impropriety." Brief of Respondents at 25. However, not only has the "appearance of impropriety" interest never been found to be compelling, but in other contexts it has been found too vague, dangerous and imprecise, *see* Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980) ("simply too dangerous and vague"); *Gregori v. Bank of America*, 254 Cal.Rptr. 853, 862 (Cal.App.Ct. 1989) ("too imprecise to furnish a reliable judicial guideline"), and one court found that "there must be at least a *reasonable* possibility that some specifically identifiable impropriety *did in fact occur.*" *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (emphasis added).

(D). No deference to North Carolina is required.

The State also argues that deference to the judgment of the legislators is due because "[n]o one is in a better position than the legislators themselves to decide what conduct by legislators and those around them might be or appear to be corrupting." Brief of Respondents at 18. However, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a

check on legislative power would be nullified." *Id.* at 844; *see also Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (Court must determine if legislation violates First Amendment rather than leaving that determination to the legislature). Therefore, because North Carolina offered no evidentiary support for its infringement of First Amendment rights, the Court need not, and indeed cannot, defer to the legislature's enactment.

(E). A "common sense analysis informed by widely reported legislative behavior from other states" provides no basis upon which to infringe First Amendment rights.

North Carolina also asserts that the Fourth Circuit used a "common sense analysis informed by widely reported legislative behavior from other states" in upholding the statute at issue. However, common sense rationale is not permitted where there is no evidentiary support that the statute advances the State's interest. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (finding the State's prohibition on liquor price advertising unconstitutionally restricted free speech even though the advertising would, based on common sense, prevent price competition and reduce consumption); *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (in absence of evidence in the record, Court refused to support common sense belief that burning flag could potentially incite others to disturb the peace). At the very least, common sense should not be allowed to support the infringement of cherished and protected free speech rights without evidentiary support in the record.

IV. The Fourth Circuit Erred In Finding That N.C. Gen. Stat. § 163-278.13B Is Narrowly Tailored.

The Respondents also ignore the Petitioners' argument that in the free speech area, broad prophylactic rules are suspect, and precision of regulation must be the goal when the government regulates in this area. *See In re Primus*, 436 U.S. 412, 437-38 (1978); *NAACP v. Button*, 371 U.S. 415, 438 (1963).[4]

In discussing the narrow tailoring requirement within the commercial speech context, this Court has recently stated that "the challenged regulation should indicate that its proponent " 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." " *Greater New Orleans Broadcasting Ass'n*, 119 S. Ct. at 1932 (citations omitted).

Respondents argue, however, that *Buckley v. Valeo*, 424 U.S. 1, supports their argument that the Fourth Circuit properly did not distinguish between large and small contributions from lobbyists. Brief of Respondents at 13. In so doing, the Respondents again conflate contribution limit analysis with prohibited source analysis.

The *Buckley* Court was not confronted with a *complete* prohibition on contributions, as in the instant case, but rather, with a *ceiling* on the amount that individuals could contribute. Therefore, the one year "temporal limitation" on contribution limits in *Buckley* has no application to this case. *See State of Florida v. Dodd*, 561 So.2d 263, 266 (Fla.

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[4] Rather than addressing this argument, the Respondents simply state that these two cases do not conflict with the Fourth Circuit's holding because "North Carolina has not sanctioned any lobbyist or organization for representing or purporting to represent the interests of anyone." Brief of Respondents at 13-14.

1990) ("The statute at issue here prohibits all contributions and solicitations. . . . As a result, the present case is vastly different from *Buckley*.").

Furthermore, the Fourth Circuit made no finding that North Carolina calculated the burdens on the speech of challengers in applying the statute to them as well. No showing has been made as to how the purpose of the statute, preventing corruption during the legislative session, is furthered by prohibiting contributions to challengers who can offer no quid pro quo at that time.

Buckley's application of contribution limitations to incumbents and challengers offers no support for the prohibition in the instant case. *Buckley* was concerned with preventing quid pro quo in the future, 424 U.S. at 33, rather than during the legislative session. Hence, both incumbents and challengers could deliver.

In this case, the Fourth Circuit found the statute narrowly tailored precisely because it "last[ed] only during the legislative session" when "the risk of an actual quid pro quo or the appearance of one runs the highest." App. 20. However, challengers cannot deliver during the legislative session when the risk is the highest. Therefore, the Fourth Circuit erred in finding N.C. Gen. Stat. § 163-278.13B was not overbroad.

Furthermore, the Respondents simply state, without proving, that if this Court were to accept the Petitioners' arguments, "the principles undergirding this Court's approval of limitations on the amount of contributions will be undermined." Brief of Respondents at 26-27. As previously shown, this case is not about limiting the *amount* of contributions; rather, it is about the government *prohibiting* participation by a certain group in the

electoral process. Therefore, limits on the *amount* of contributions remain unaffected.

Finally, it does not follow that simply because a State may constitutionally impose ceilings on contributions, it may also validly limit when contributions are made. *See* Brief of Respondents at 24. A temporal "limit" is not really a limit at all; it is a ban. Essentially, by limiting when contributions may be made, the State is determining when speech is permitted and prohibited. *Buckley* does not stand for this proposition. *Buckley* does not regulate when an individual may make a contribution, but leaves the determination of when speech will be most effective to the individual. It is true that once an individual reaches the ceiling he or she may not contribute again until January 1; however, the individual is free to determine if, and when, the ceiling will be reached.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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